

6-1
D-23

FILED
SAN MATEO COUNTY

MAY 8 1 2019

Clerk of the Superior Court

By

DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

Six4Three, a Delaware limited liability
company,

Plaintiff;

v.

Facebook, Inc., a Delaware corporation;
Mark Zuckerberg, an individual;
Christopher Cox, an individual; **Javier**
Olivan, an individual; **Samuel Lessin**, an
individual; **Michael Vernal**, an individual;
Ilya Sukhar, an individual; and **Does 1-50**,
inclusive,

Defendants.

Case No. CIV533328

Assigned for all purposes to Hon. V.
Raymond Swope, Dep't 23

**DECLARATION OF THEODORE KRAMER RE
RETENTION OF COUNSEL**

CIV533328
DECL
Declaration
1853173



1 I, Theodore Kramer, declare under penalty of perjury as follows.

2 1. My name is Theodore Kramer. I am over the age of 18. I make these statements
3 pursuant to the Court's Order that a Case Management Conference statement addressing
4 Plaintiff's retention of counsel be submitted prior to the upcoming Case Management
5 Conference. I have personal knowledge of the matters stated in this declaration, and I believe
6 those matters to be true.

7 2. I am the CEO (and Managing Member) of Plaintiff Six4Three, LLC ("643" or
8 "Plaintiff"), and I make these statements on its behalf.

9 3. Since late November 2018, I have made a concerted effort to secure substitute
10 counsel for Plaintiff, contacting and interviewing dozens of law firms in the process. Attached as
11 **Exhibit 1** is a true and correct copy of my prior declaration summarizing my earlier efforts to
12 find counsel, submitted to this Court on January 24, 2019, and whose contents are not repeated in
13 this declaration.

14 4. Since the issuance of the Order Relieving Counsel on April 30, 2019, I have
15 redoubled these efforts.

16 5. I have found several firms which have demonstrated interest in the case, but
17 which have been unwilling to commit to representing 643 since they cannot determine the
18 nature, scope or budget for the potential representation given the uncertainty regarding the type
19 of remedy, if any, Defendant Facebook ("Defendant") may seek given its repeated failure to
20 adhere to the required procedure for indirect contempt and sanctions in California.

21 6. The above-mentioned firms are unwilling to represent Plaintiff until they know
22 what form of sanctions or contempt motion and associated discovery, if any, they will be
23 defending as part of their representation of Plaintiff. Thus, I respectfully request both that 643 be
24 given more time to retain counsel to continue its concerted efforts, and further that Defendant
25 formally lodge whatever motion or order to show cause it has threatened to bring for almost six
26 (6) months now.

27 7. Since November 2018, Defendant has repeatedly threatened to initiate contempt
28 and sanctions proceedings against Plaintiff without providing any clarification as to what the

1 nature of those proceedings will be, and without filing any affidavit defining the scope of those
2 proceedings, which would afford 643 various rights, defenses and requirements, such as rights of
3 due process and the right to a full evidentiary hearing.

4 8. Attached as **Exhibit 2** is a true and correct copy of Defendant's Ex Parte
5 Application for Expedited Relief Re Six4Three's Contempt Including an Order to Show Cause
6 Dated November 26, 2018, in which Defendant requests an Order to Show Cause on why both
7 terminating sanctions and monetary sanctions should not issue against Plaintiff and its then
8 counsel. FB Ex Parte for Expedited Relief, 1:2-3.

9 9. Although the Court denied the above request as procedurally improper on
10 November 30, 2018, in the six (6) intervening months Defendant has not filed a proper affidavit
11 for an Order to Show Cause, but it has nonetheless repeatedly made vague and undefined threats
12 of contempt proceedings against 643, its principal and its legal team.

13 10. Attached as **Exhibit 3** is a true and correct copy of Defendant's Brief Re: Court's
14 Order Dated November 20, 2018. Defendant titles Section II of this Brief "The Court Should
15 Grant Discovery and Issue an Order to Show Cause and Promptly Conduct Contempt
16 Proceedings." FB Brief Re: Nov. 20 Order, 5:10. Despite its title, the section does not define the
17 nature of the contempt proceedings Defendant alludes to, barely mentioning contempt at all.

18 11. Notwithstanding the above, Facebook goes on to make vague threats of contempt,
19 without providing any further clarification at three later points in the Brief. Id., 14:17, 15:6,
20 17:27.

21 12. Despite asking for terminating sanctions and monetary sanctions in **Exhibit 2**, at
22 the December 7, 2018 Hearing, Defendant's counsel told the Court that while they were
23 intending to pursue sanctions, they did not know what the appropriate remedies and sanctions
24 would be. A true and correct copy of the relevant pages of that hearing's transcript are attached as
25 **Exhibit 4**.

26 13. Then, on February 21, 2019, Defendant filed a Case Management Statement with
27 the Court in which it stated that it would file its "motions for terminating sanctions, contempt"
28 on May 7, 2019 and requested a hearing date for these ill-defined motions on May 29, 2019.

1 Defendant failed to file any “motions for terminating sanctions, contempt” on May 7, 2019. A
2 true and correct copy Defendant’s Case Management Statement Dated February 21, 2019 is
3 attached as **Exhibit 5**.

4 14. Further confusing matters for any potential counsel are the statements Defendants
5 in this action recently made to the Court of Appeals regarding the nature of proceedings currently
6 pending before this Court.

7 15. In the Brief of Cross-Respondents regarding Plaintiff’s Appeal of this Court’s
8 order on Defendants’ California Code of Civil Procedure Section 425.16 Motion, Defendants
9 begin by stating “in ongoing proceedings below Six4Three now faces contempt charges and
10 additional sanctions,” and goes on to repeat that claim, stating that “[t]he sanctions proceedings
11 are ongoing,” citing this Court’s words as purported support. Cross-Respondent’s Brief, pp. 1,
12 26. These statements to the Court of Appeals are false, as 643 does not currently face contempt
13 charges and sanctions, notwithstanding that binding case and statutory authority require
14 Defendant to proceed with a motion or Order to Show Cause to continue to pursue this collateral
15 litigation, which has now gone on for six (6) months without any formal accusation of
16 wrongdoing, at great expense to the parties and to the Court, and to 643’s great prejudice. A true
17 and correct copy of this appellate brief filed May 28, 2019 is attached hereto as **Exhibit 6**.

18 16. Because of Defendant’s contradictory and ill-defined threats of sanctions and
19 contempt proceedings designed to harass and intimidate Plaintiff and all those advocating on
20 Plaintiff’s behalf, potential counsel is unsure of the nature of their representation of Plaintiff, or
21 the requirements of that representation. All of the interested counsel I have spoken with have
22 required more certainty on this issue before they execute a representation agreement with
23 Plaintiff.

24 17. For instance, on May 30, 2019, I received a letter from one such potential counsel
25 informing me that as a result of my being “unable to produce for my review any petition,
26 complaint, affidavit, or other pleading for any alleged violation of any provision of the California
27 Penal Code, Civil Code, or any other pleading for criminal, civil, or other contempt or for any
28 claimed or sought sanctions against the Company,” as well as the fact that “no such petition,

1 complaint, motion or other pleading [is] on the public docket,” the firm is unable to adequately
2 understand the liability Plaintiff faces and the remedy Defendant seeks. The letter goes on to
3 state that the “required process in a criminal case substantially differs from a civil action. If you
4 wish for me to consider representing the Company, and potentially you, I will need to
5 understand, much better, the nature of any criminal liability. I will also need to review the formal
6 accusations against the Company and any accusations against you as the principal of the
7 Company, including any evidence offered in support of such allegations to determine their
8 sufficiency as a matter of law.” A true and correct copy of this letter is attached as **Exhibit 7**.

9 18. Potential counsel are also concerned by the possibility that if they do pursue
10 sanctions and contempt proceedings, Defendant will seek an expedited briefing schedule for
11 doing so, as they did in **Exhibit 2**. An expedited briefing schedule would make it impossible for
12 potential counsel to get up to speed fast enough to competently defend Plaintiff.

13 19. Additionally, potential counsel are further dissuaded by the threats Defendant’s
14 counsel have made against my personal counsel. Most recently, in their Discovery Letter Brief
15 Dated May 2, 2019, Defendant’s counsel accused my personal counsel of breaching the
16 California Attorney Guidelines of Civility & Professionalism and the Santa Clara County Bar
17 Association Code of Professionalism because they have been unable to serve Mr. Scaramellino at
18 his home address. Further, in that same letter, Defendant accuses Mr. Scaramellino of “play[ing]
19 a central role in the disclosure of Facebook’s confidential and highly confidential information,”
20 and yet Defendant has filed no complaint, motion or Order to Show Cause against Mr.
21 Scaramellino, which it is required to do in light of the repeated and unequivocal accusations it
22 has made and which have caused the breakdown of 643’s legal team, legal strategy and its ability
23 to pursue its case. Any and all legal assistance 643 has secured has been subject to
24 unsubstantiated and harassing accusations by Defendant which has the very real potential of
25 damaging the reputation of those accused without affording any process by which to defend
26 against such unfounded accusations and clear their names in the eyes of the legal community.
27 This has been expressed to me repeatedly as a dissuading factor for potential counsel. A true and
28 correct copy of the relevant section of that letter brief is attached hereto as **Exhibit 8**.

1 20. Further, many potential counsel have asked, in substance, what would happen if
2 new governmental subpoenas from the United States Congress, Federal Trade Commission,
3 Securities and Exchange Commission, Department of Justice or Canadian authorities issue on
4 643 or its new or former Counsel, without this Court having clarified Section 16 of the Protective
5 Order, as 643 has repeatedly requested. I am unable to answer this question for potential counsel;
6 nor is Facebook willing to cooperate to correct or otherwise clarify multiple ambiguities. Thus, a
7 further dissuading factor is the uncertainty regarding potential steps national and international
8 legislative bodies will take in response to the continued refusal of Defendant's executives to
9 cooperate with multiple investigations into Facebook's business regarding the very conduct at the
10 heart of this case, and the manner in which those responses could further prejudice Plaintiff's
11 case and cause Defendant to take unanticipated punitive steps against Plaintiff or its potential
12 future counsel.

13 21. On May 28, 2019, in response to their failure to comply with a Parliamentary
14 subpoena, the Parliament of Canada's House of Commons Standing Committee on Access to
15 Information, Privacy and Ethics adopted a motion to serve Mark Zuckerberg and Sheryl
16 Sandberg with a formal summons should they arrive in Canada. The Canadian Parliament has
17 expressed unequivocally that the issuance of an open formal summons was an extraordinary step
18 it had never taken before in light of Mr. Zuckerberg's continued refusal to appear before and
19 cooperate with the Canadian government. A true and correct copy of a news release by Canada's
20 Standing Committee on Access to Information, Privacy and Ethics discussing the same is
21 attached hereto as **Exhibit 9**.

22 22. It was Mr. Zuckerberg's failure to cooperate with lawful summons and subpoenas
23 from the United Kingdom Parliament for more than a year that caused the United Kingdom
24 Parliament to undertake the extraordinary measure of seizing my files in the first place. Had Mr.
25 Zuckerberg cooperated with the lawful orders of the United Kingdom, this entire collateral
26 litigation would never have occurred because I would not have been subject to such
27 extraordinary and unprecedented action by the United Kingdom. Now that Mr. Zuckerberg is
28 evading the lawful orders of both the United Kingdom and Canada, and in light of the fact that

1 the Canadian government has decided to sue Defendant in Canadian federal court after
2 collaborating with the United Kingdom in its investigation of Facebook, 643 must anticipate
3 further punitive and retaliatory measures will be taken by Facebook and Mr. Zuckerberg.

4 23. Authorities in the United States with oversight and enforcement powers over
5 Facebook are now repeatedly referring to and relying upon the evidence from this case that has
6 been published in the United Kingdom. Attached as **Exhibits 10, 11, and 12** are true and correct
7 copies, respectively, of Congressman Cicilline's Letter to the FTC, Congressman Wyden's Letter
8 to the FTC, and a statement by Senator Blumenthal, all of which refer to this case. The continued
9 investigations in the United States will no doubt result in further retaliatory, harassing and
10 punitive actions by Defendant, further prejudicing 643's case and creating uncertainty for new
11 potential counsel.

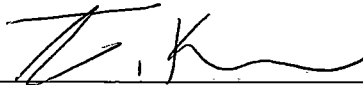
12 24. Given Defendant's previous attempts to take action against 643, its former legal
13 team, and me for alleged disclosures of Facebook's confidential information *after* all such
14 information in our possession was destroyed under the supervision of Defendant's counsel,
15 Defendant's continued reticence to voluntarily participate in investigations being conducted by
16 more than nine national governments around the world, and the decisive action international
17 governmental bodies could take as a result, any potential counsel for 643 faces more uncertainty.

18 25. Until Plaintiff secures counsel, Plaintiff is unable to respond to Defendant's
19 Requests for Production and Special Interrogatories, served on Plaintiff on May 3, 2019.
20 Attached as **Exhibit 13** is a true and correct copy of those discovery requests. Further, it my
21 understanding that all discovery, including the attached requests issued to 643, is stayed pursuant
22 to this Court's order on May 10, 2019 staying all discovery. 643 reserves all its rights and
23 objections pertaining to these discovery requests.

24 26. Plaintiff respectfully requests, and the interests of justice require, that Plaintiff be
25 given ninety (90) days to secure new counsel and that Facebook file whatever formal motions for
26 sanctions and/or contempt it has threatened for six (6) months now within thirty (30) days or the
27 Court deem Defendant to have waived any such motion regarding the alleged conduct. Finally,
28 the Court should read and take into account Ms. Carole Cadwalladr's public presentation on

1 TED.com (text transcript attached as **Exhibit 14**) where she notes the damage Facebook has
2 achieved through its continuing lack of transparency and its refusal to honor basic human rights.
3 That Facebook is now trying to use this Court to punish and gag me and my Company is quite
4 upsetting and makes it challenging for me both personally, physically, psychologically and
5 emotionally.

6
7 I declare under penalty of perjury under the laws of the State of California that the
8 foregoing is true and correct and that this declaration was entered into on May 31, 2019 in San
9 Francisco, California.

10
11 

12 Theodore Kramer
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

D-23

FILED
SAN MATEO COUNTY

JAN 24 2019

Clerk of the Superior Court

By

DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

Six4Three, a Delaware limited liability
company,

Plaintiff;

v.

Facebook, Inc., a Delaware corporation;
Mark Zuckerberg, an individual;
Christopher Cox, an individual; **Javier**
Olivan, an individual; **Samuel Lessin**, an
individual; **Michael Vernal**, an individual;
Ilya Sukhar, an individual; and **Does 1-50**,
inclusive,

Defendants.

Case No. CIV533328

Assigned for all purposes to Hon. V.
Raymond Swope, Dep't 23

**DECLARATION OF THEODORE KRAMER
REGARDING PLAINTIFF SIX4THREE'S
CONDITIONAL ACCEPTANCE OF BIRNBAUM
& GODKIN AND GROSS & KLEIN'S MOTION
TO BE RELIEVED AS COUNSEL FOR
PLAINTIFF SIX4THREE, LLC**

Date: February 22, 2019
Time: 9:00 a.m.
Department: 23

Action Filed April 10, 2015
Trial Date: None set

CIV533328
DECL
Declaration
1614436



1 I, Theodore Kramer, declare under penalty of perjury as follows.

2 1. My name is Theodore Kramer. I am over the age of 18. I make these statements in
3 support of Plaintiff Six4Three's ("Plaintiff" or "643") Conditional Acceptance of Birnbaum &
4 Godkin and Gross & Klein's Motion to be Relieved as Counsel. I have personal knowledge of
5 the matters stated in this declaration, and I believe those matters to be true.

6 2. I am the CEO (and Managing Member) of Plaintiff 643 and make these
7 statements on its behalf.

8 3. I believe we at 643, including the legal team, complied with Section 16 of the
9 Protective Order and all other Court Orders. In coordination with counsel for 643, I took
10 measures at the time the Dropbox sub-folder in which Facebook's highly confidential files were
11 reviewed to prevent my access to those files and requested that counsel do the same. Prior to the
12 United Kingdom Parliament ordering me to search my computer under its direct supervision, I
13 had never accessed that Dropbox sub-folder. I have never reviewed any files or documents
14 produced by Facebook with the "Highly Confidential" Bates Stamped designation.

15 4. Beyond our control (and certainly beyond my control), it is now apparent as a
16 result of the events in the United Kingdom that at least some of the Dropbox cloud sub-folders
17 did not have the proper permission settings or that the organization of the sub-folders in the
18 Dropbox cloud account was not synced fully with the organization of the folders on the personal
19 computers of the team members who had access to the account, or some other technical issue
20 occurred that modified or undermined what I believed to be the permissions settings which I
21 always understood were limited to the litigation team comprised of Birnbaum & Godkin and
22 Gross & Klein who are both counsel to Plaintiff.

23 5. However, since it has become apparent that Birnbaum & Godkin and Gross &
24 Klein were and are both no longer willing or able to represent 643 based on their statements to
25 this Court that they have an "unwaivable conflict" resulting from Facebook's unfounded
26 accusations against 643 and counsel, and in light of counsel's continued (and continuous) failure
27 to substantively represent Plaintiff in the various motions and applications filed by Defendant
28

1 since late November 2018, I have made a concerted effort to secure substitute counsel for
2 Plaintiff, contacting and interviewing over a dozen law firms in the process.

3 6. Besides the firm of Mr. Edward V. King Jr., King & Kelleher, LLP, who
4 confirmed in a declaration that he will not take on the case unless given substantial time to get up
5 to speed, I have been unable to find a firm which has demonstrated strong interest in the case,
6 particularly in light of the potential need to get up to speed in a matter of weeks with pending but
7 as yet unknown terminating sanctions or unknown contempt motions hanging collaterally over
8 this proceeding.

9 7. Of these law firms, a significant number have expressed that they are unable to
10 represent Plaintiff due to a conflict of interest generated by their previous or ongoing
11 representation of Defendant Facebook, Inc.

12 8. Law Firm No. 1, with over 1,000 attorneys over a dozen international offices,
13 declined the case due to its current representation of Facebook, Inc.

14 9. Law Firm No. 2, in San Francisco with nearly 100 attorneys, declined the case
15 due to its current representation of Facebook, Inc.

16 10. Law Firm No. 3, in San Mateo with less than ten attorneys, declined the case due
17 to a conflict of interest involving Facebook, Inc.

18 11. Law Firm No. 4, in San Francisco with almost forty attorneys, declined the case
19 due to a conflict of interest involving Facebook, Inc.

20 12. Law Firm No. 5, in Mountain View with over 350 attorneys, declined the case due
21 to its current representation of Facebook, Inc.

22 13. Law Firm No. 6, in Los Angeles with almost forty attorneys, informed me of a
23 potential conflict owing to its ongoing involvement in a suit against Facebook, Inc.

24 14. Given the continued inability or unwillingness of Plaintiff's counsel of record to
25 represent Plaintiff, as well as the hardship of acquiring unconflicted substitute counsel to
26 represent Plaintiff in this matter, I now realize that the original March 31, 2019 estimate in the
27 Stipulation Regarding Hearing Dates on Pending and Potential Motions, submitted to the Court
28 on December 26, 2018 was overly optimistic.

15. It is likely that Plaintiff will need a longer extension of time to acquire new counsel and allow them to get up to speed without prejudicing Plaintiff.

16. Specifically, on behalf of Plaintiff and as its CEO and Managing Member, I will conditionally accept and agree to the motion to withdraw filed by Birnbaum & Godkin and Gross & Klein if Plaintiff is given until **May 31, 2019** to retain new counsel.

17. I will continue diligent efforts to retain counsel, but I believe our current counsel should remain responsible for managing the electronically stored information (“ESI”) on cloud accounts pending new counsel being appointed by Plaintiff.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was entered into on January 24, 2019 in San Francisco, California.


Theodore Kramer

EXHIBIT 2

1 DURIE TANGRI LLP
2 SONAL N. MEHTA (SBN 222086)
3 smehta@durietangri.com
4 JOSHUA H. LERNER (SBN 220755)
5 jlerner@durietangri.com
6 LAURA E. MILLER (SBN 271713)
7 lmiller@durietangri.com
8 CATHERINE Y. KIM (SBN 308442)
9 ckim@durietangri.com
10 ZACHARY G. F. ABRAHAMSON (SBN 310951)
11 zabrahamson@durietangri.com
12 217 Leidesdorff Street
13 San Francisco, CA 94111
14 Telephone: 415-362-6666
15 Facsimile: 415-236-6300

16 Attorneys for Defendants
17 Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
18 Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA

20 COUNTY OF SAN MATEO

21 SIX4THREE, LLC, a Delaware limited liability
22 company,

23 Plaintiff,

24 v.

25 FACEBOOK, INC., a Delaware corporation;
26 MARK ZUCKERBERG, an individual;
27 CHRISTOPHER COX, an individual;
28 JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

FILED
SAN MATEO COUNTY

NOV 26 2018

Clerk of the Superior Court

By

DEPUTY CLERK

CIV533328
EPA
Ex Parte Application
1511419



Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**DEFENDANT FACEBOOK, INC.'S EX
PARTE APPLICATION FOR EXPEDITED
RELIEF RE SIX4THREE'S CONTEMPT,
INCLUDING AN ORDER TO SHOW CAUSE.**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

1 Defendant Facebook, Inc. ("Facebook") files this *ex parte* application for expedited relief,
2 including an order to show cause as to why terminating sanctions and monetary sanctions should not
3 issue against Plaintiff Six4Three LLC ("Six4Three") and its counsel. Specifically, Facebooks requests:

4 (1) An Order to Show Cause why terminating sanctions and monetary sanctions should not issue
5 against Six4Three and its counsel in light its repeated and willful violations of this Court's
6 protective and sealing orders.

7 (2) An order that Six4Three and its counsel produce the following categories of documents on
8 Thursday, November 29, 2018:

- 9 a. All written or recorded communications between Six4Three, including without
10 limitation Ted Kramer, Thomas Scaramellino, David Godkin, James Kruzer, Stuart
11 Gross, and any other agent or representative of Six4Three, on the one hand, and any
12 other individual or entity (other than this Court or Facebook) on the other hand,
13 regarding Facebook's confidential information. For the avoidance of doubt, this
14 includes but is not limited to media organizations and governmental entities, including
15 the Digital, Culture, Media and Sport Committee of the House of Commons.
- 16 b. Documents (e.g., phone logs) sufficient to show all telephonic and/or video conference
17 communications between Six4Three, including without limitation Ted Kramer,
18 Thomas Scaramellino, David Godkin, James Kruzer, Stuart Gross, and any other agent
19 or representative of Six4Three, and any individual or entity (other than this Court or
20 Facebook) regarding Facebook's confidential information. For the avoidance of
21 doubt, this includes but is not limited to media organizations and governmental
22 entities, including the Digital, Culture, Media and Sport Committee of the House of
23 Commons.
- 24 c. Document sufficient to show the identity of all individuals or entities with whom Ted
25 Kramer, David Godkin, James Kruzer, and Stuart Gross, or any other agent or
26 representative of Six4Three, discussed Facebook's confidential information.

27 (3) An order that depositions of the following individuals take place in San Mateo County by
28 Wednesday, December 5, 2018:

- a. Ted Kramer
- b. David Godkin
- c. Stuart Gross
- d. Thomas Scaramellino

Following the depositions, Facebook proposes that Six4Three file an opening brief in response to an Order to Show Cause by Friday, December 7, 2018. Facebook's responsive brief would then be due on Tuesday, December 11, 2018. Facebook requests that the Court set a hearing following the close of briefing at the Court's earliest convenience.

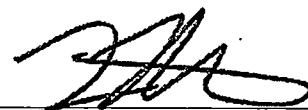
Notice of this application was provided to Six4Three through the Court's correspondence of November 19, 2018.

This application is based upon the memorandum of points and authorities, the declaration of Laura E. Miller, and such additional evidence and argument as may be presented at or before any hearing on this matter.

Dated: November 26, 2018

DURIE TANGRI LLP

By: _____



SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM
ZACHARY ABRAHAMSON

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox,
Javier Olivan, Samuel Lessin, Michael Vernal, and
Ilya Sukhar

1 **I. INTRODUCTION**

2 These are extraordinary circumstances. Six4Three and its counsel have knowingly violated basic
3 litigation rules and procedures, not to mention multiple orders of this Court directing Six4Three not to
4 misuse or leak confidential documents produced by Facebook in this case.¹

5 Indeed, in the last week, we have learned that Six4Three's principal Ted Kramer traveled to the
6 United Kingdom with a thumb drive of confidential, sealed materials, including materials he never
7 should have had access to in the first place under the Stipulated Protective Order. This collection of
8 documents apparently included the sealed Declaration of Six4Three's lawyer David Godkin—a 76-page
9 document full of mischaracterizations of documents and speculation about events and intentions that
10 counsel never could have testified to under oath. Then, notwithstanding the requirements of the
11 Stipulated Protective Order itself, the Court's prior order sealing these documents, and the Court's
12 express order last week that Mr. Kramer not produce the sealed documents in the United Kingdom, Mr.
13 Kramer did *exactly what the Court ordered him not to do*.

14 More than two years ago, as is standard in similar cases, the Court entered a Stipulated Protective
15 Order that prohibits the use and disclosure of confidential and highly confidential documents produced in
16 this litigation. Throughout the litigation, Six4Three and its counsel sought internal Facebook documents
17 in discovery. Although the Court denied a number of Six4Three's requests, Facebook participated in
18 discovery in good faith and produced documents, including ones containing confidential and highly
19 confidential material, subject to the protections of the Stipulated Protective Order.

20 In an effort to create media interest, Six4Three attached hundreds of internal confidential and
21 highly confidential documents to Mr. Godkin's declaration in support of Six4Three's opposition to the
22 Individual Defendants' anti-SLAPP motion. Six4Three and a number of media outlets with whom
23 Six4Three was communicating then sought to unseal the documents. The Court, however, rejected
24 Six4Three's gamesmanship. The Court carefully reviewed and sealed most of the documents—many of
25

26
27 ¹ When Facebook initially brought this issue to the Court's attention, it sought to address Six4Three and
28 its counsels' misuse of documents produced in this case to sue Facebook in another recently filed matter.
Since then, Facebook has learned of an even more egregious violation of the Court's various protective
and sealing orders, which we also address herein.

1 which the Court found irrelevant or to be mischaracterized by Six4Three's counsel—on November 1,
2 2018.

3 That should have been the end of this. But Six4Three betrayed the Court's orders. Over the
4 holiday week when it was difficult for counsel or the Court to react quickly, Six4Three suddenly
5 announced that Mr. Kramer was in the United Kingdom and intended to disclose the sealed documents to
6 officials conducting an inquiry there. Although Six4Three provided less than 24 hours of notice, the
7 Court reacted quickly. On November 20, 2018, the Court confirmed its prior orders and specifically
8 ordered Six4Three not to disclose the documents to the Parliamentary Committee. Just three days after
9 the Court's Order—on the Friday before the Thanksgiving weekend—Six4Three's counsel provided
10 notice that Mr. Kramer had flatly violated this Court's Orders. Six4Three's counsel leaves no doubt as to
11 what happened—he admits that the documents that Mr. Kramer turned over include documents this Court
12 has now repeatedly ordered sealed.²

13 There can be no dispute that immediate relief is necessary. Mr. Kramer violated multiple orders,
14 including this Court's most recent order, and could only have done so knowingly and intentionally. This
15 is no mere "technical foul"—it is a fundamental challenge to this Court's basic authority. There also can
16 be no question that neither Six4Three nor its counsel are to be trusted to comply with this Court's orders
17 regarding the documents produced in this case. There is real and tangible risk that Six4Three or its
18 counsel will continue to violate this Court's orders and leak confidential materials to other third parties.

19 Given the repeated disregard for this Court's orders, Facebook requests an order to show cause
20 why terminating sanctions should not issue as well as sanctions for contempt. The hearing on the order
21 to show cause should be preceded by a limited document production and depositions so that the Court
22 and Facebook can ascertain the full scope of the violations and harm done beyond what we already
23 know.

24
25
26
27 ² Declaration of Laura E. Miller submitted herewith ("Miller Decl.") Ex. 1 (Email from Godkin to Salimi
28 (Nov. 23, 2018)); *see also* <https://www.cnn.com/2018/11/24/us/six4three-facebook-uk-parliament/index.html>.

II. BACKGROUND FACTS AND ARGUMENT

A. Ted Kramer and Six4Three's Counsel Violated Multiple Court Orders.

The Court has been notified of Ted Kramer's disclosure of Facebook's confidential information through a series of communications beginning on November 19, 2018.³ To briefly summarize the facts that we already know:

In accordance with the terms of the Stipulated Protective Order, on May 30, 2018, Facebook filed a motion to seal confidential information contained in several hundred internal Facebook documents that Six4Three's counsel, Mr. Godkin, attached to his declaration filed in opposition to Facebook's anti-SLAPP motions. Six4Three opposed Facebook's motion to seal. On November 1, 2018, after extensive briefing and a hearing, the Court issued a detailed order sealing the vast majority of these documents (and striking others from the record entirely).

Less than a month later, it appears that Six4Three has devised a way around the Court's protective and sealing orders. On November 19, 2018, Mr. Godkin advised Facebook, with less than 24 hours' notice, that one of its founders, Ted Kramer, had been asked to disclose the sealed documents to the United Kingdom Digital, Culture, Media and Sport Committee of the House of Commons (the "DCMS Committee"). Miller Decl. Ex. 2 (Letter from Godkin to Mehta (Nov. 19, 2018)). According to Mr. Godkin, the Committee ordered Mr. Kramer to turn over the documents while he was traveling in the United Kingdom, purportedly on other business. *Id.* But neither Six4Three nor its counsel offered any explanation as to how the Committee knew Mr. Kramer was in the U.K. or why he was traveling with sealed documents, many pages of which he is not permitted to even have access to under the Stipulated Protective Order.

Facebook immediately responded, reminding Six4Three and its counsel that any disclosure of Facebook's confidential information would be a violation of the Stipulated Protective Order and the Court's November 1, 2018 sealing order, and that it appeared that there had already been a violation of the Stipulated Protective Order because Mr. Godkin should not have allowed Mr. Kramer access to

³ In its Order of November 20, 2018, the Court requested briefing on a specific set of questions regarding the DCMS Committee request. Facebook will address those specific issues in its submission this Wednesday, November 28, 2018.

Facebook's Highly Confidential Information. *See* Miller Decl. Ex. 3 (Letter from Miller to Godkin (Nov. 19, 2018)); Ex. 4 (October 25, 2016 Protective Order at 5 (prohibiting disclosure of Highly Confidential Information to "individual parties or directors, officers or employees of a party"))).

That evening, Facebook also contacted the Court, copying Six4Three's counsel, requesting an immediate teleconference regarding the impending disclosure of Facebook's confidential information to the DCMS Committee. *See* Miller Decl. Ex. 5 (Email from Miller to Court (Nov. 19, 2018); Email from Court to Miller (Nov. 20, 2018)). The Court responded via email early the next morning expressly stating that "[n]o documents shall be transmitted/released until further order of this Court." *Id.* At approximately the same time, Mr. Godkin sent a letter to the DCMS Committee informing it that Facebook was "seeking appropriate relief from the Superior Court of California, San Mateo County" and that his "client" was "unable to comply with the Order unless and until the Superior Court permits." Miller Decl. Ex. 6 (Letter from Godkin to Collins (Nov. 20, 2018)).

The Court's Order of November 20, 2018, acknowledged the receipt of the correspondence provided by the parties, and requested briefing on a set of specific legal and factual questions. The Court further specified:

No unredacted copies of Plaintiff's opposition to either Facebook's Special Motion to Strike or Individual Defendants' Special Motion to Strike shall be transmitted, released or submitted, until further order of the Court.
Failure to comply will be considered an act of contempt.

Following the Court's November 20, 2018 Order and further correspondence from the DCMS Committee, Mr. Godkin sent another letter to the DCMS Committee on November 21, 2018, again stating that Mr. Kramer was not authorized to disclose Facebook's confidential information. Miller Decl. Ex. 7 (Letter from Godkin to Collins (Nov. 21, 2018)).

Unbeknownst to Facebook, however, on or around November 21, 2018, we understand that Mr. Kramer disclosed an as-of-yet-unidentified set of Facebook's confidential information, via a thumb drive, to the DCMS Committee in direct violation of this Court's orders. Miller Decl. Ex. 8 (Email from Godkin to Miller (Nov. 23, 2018)). Facebook was not notified of this disclosure until ***two days later***, on the afternoon of Friday, November 23, 2018, after the Court was already closed for the Thanksgiving holiday.

1 As the Court noted in its November 20, 2018 Order, Six4Three's counsel has failed to explain the
2 events and circumstances that led to the DCMS Committee's request and Mr. Kramer's eventual
3 disclosure of Facebook's confidential information on November 21, 2018. The unresolved questions
4 include, for example: Why did Mr. Kramer even have the sealed documents? Who gave them to him?
5 Why did he travel to the United Kingdom with them? Did Mr. Kramer tell the DCMS Committee that he
6 had the documents? Did Mr. Kramer tell the DCMS Committee that he would be in the United Kingdom
7 and where to reach him? What exactly did Mr. Kramer provide to the Committee?

8 At this point, Facebook, and importantly the Court, cannot determine the scope of the violations
9 of this Court's orders without disclosure of the documents and records revealing what happened here,
10 cross examination of the relevant players (via deposition and/or evidentiary hearing), and a live hearing
11 before the Court.

12 **B. Six4Three's Counsel Also Violated the Stipulated Protective Order by Improperly**
13 **Using Confidential Material in Another Case.**

14 The knowing and intentional breach of the Court's orders described above would, standing alone,
15 warrant a contempt finding and severe sanctions. But the concerns raised as to Six4Three and its
16 counsels' disrespect for the Court's orders are only exacerbated because this breach appears to be part of
17 a broader pattern.

18 It has recently come to Facebook's attention that Six4Three's counsel, David Godkin, James
19 Kruzer, and Stuart Gross, further violated the Stipulated Protective Order and this Court's sealing orders
20 through the filing of a new complaint in San Francisco County Superior Court, *Styleform IT v. Facebook,*
21 *Inc.*, Case No. CGC 18-571075 (the "Styleform Complaint"). See Miller Decl. Ex. 9.

22 Paragraph 3 of the Stipulated Protective Order reads as follows:

23 All Confidential Information or Highly Confidential Information produced
24 or exchanged in the course of this Case (not including information that is
25 publicly available) shall be used by the party or parties to whom the
26 information is produced ***solely for the purpose of this case.*** Confidential
27 Information or Highly Confidential Information ***shall not be used for any***
28 ***commercial competitive, personal, or other purpose.*** Confidential
Information or Highly Confidential Information must be stored and
maintained by a receiving party at a location and in a secure manner that
ensures that access is limited to the persons authorized under this
Stipulated Protective Order.

1 The Styleform Complaint violates the Stipulated Protective Order in at least two primary ways.
2 **First**, it is clear on the face of the Styleform Complaint that Styleform does not have any personal
3 knowledge of the internal Facebook communications, decisions, or strategies it alleges.⁴ Instead, it
4 appears that, as counsel for both Six4Three and Styleform, Mr. Godkin, Mr. Kruzer, and Mr. Gross
5 inappropriately drafted the Styleform Complaint that, while mischaracterizing Facebook's confidential
6 documents, improperly relies on them nonetheless. That is a direct violation of our Stipulated Protective
7 Order, which states that the confidential information produced by Facebook in the Six4Three litigation
8 "shall be used by the party or parties to whom the information is produced *solely for the purpose of this*
9 *case*," and "*shall not be used for any commercial, competitive, personal, or other purpose.*"

10 **Second**, in addition to the improper *use* of Facebook's confidential information in drafting the
11 Styleform Complaint, Six4Three's counsel also **disclosed** certain confidential information contained in
12 the documents Facebook produced in this litigation, subject to the Stipulated Protective Order and
13 ordered sealed by this Court. These disclosures are a direct violation of the Stipulated Protective Order
14 and the Court's various sealing orders, and provide additional evidence of the improper use of
15 Facebook's confidential documents in drafting the Styleform Complaint.

16 For example, Styleform alleges that "Tinder provided highly valuable unrelated financial
17 consideration, including intellectual property, to Facebook in exchange for its special access to APIs."
18 Styleform Compl. ¶ 68. As Facebook has stated on multiple occasions and as Facebook's witnesses have
19 testified under oath, this allegation is false and relies on the continued misreading of a confidential email
20 chain produced by Facebook. Nothing in the public domain addresses this alleged transfer of intellectual
21 property from Tinder to Facebook as consideration for special access to APIs— because no such transfer
22 ever occurred. Furthermore, this Court has granted multiple motions sealing the underlying document
23 that Six4Three continues to mischaracterize and related discussions in the briefing. *See, e.g.*, November
24 1, 2018 Amended Order re: Motion to Seal (sealing Exhibit 97 and striking paragraph 98 of the Godkin

25
26 ⁴ See Cal. Code Civ. Proc. § 128.7(b)(3) ("By presenting to the court, whether by signing, filing,
27 submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an
28 attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after
an inquiry reasonable under the circumstances," certain conditions are met, including "[t]he allegations
and other factual contentions have evidentiary support or, if specifically so identified, are likely to have
evidentiary support after a reasonable opportunity for further investigation or discovery.").

Declaration in Support of Six4Three's Opposition to the Individual Defendants' Special Motion to Strike).

As another example, the Styleform Complaint alleges that Facebook paid a PR firm "almost \$50,000 a month" to "disseminate this fraudulent pro-privacy narrative." Styleform Compl. ¶ 165. This allegation is again untrue, and appears to rely on yet another mischaracterization of a confidential document produced by Facebook in this litigation. This document was similarly subject to a sealing order. *See, e.g.*, January 11, 2018 Order re: Motion to seal (granting in full Facebook's January 8, 2018 Motion to Seal).

As a final example, Styleform alleges: "[I]n 2009, Facebook executives discussed backing down publicly on their promise of a level competitive playing field. They decided internally to back down on these promises, but concealed this decision from Developers, including Styleform, and continued to misrepresent Facebook Platform as a level competitive playing field." Styleform Compl. ¶ 7. As above, the only possible source for Styleform's false allegation about internal Facebook communications is the repeated mischaracterization of the confidential information that Facebook produced, the disclosure and use of which is barred by the Stipulated Protective Order.

When Facebook brought these violations to the attention of Six4Three and Styleform's counsel, requesting that they immediately withdraw the Styleform Complaint and immediately identify all individuals and entities to whom they disclosed Facebook's confidential information, the only response was a categorical denial. Miller Decl. Exs. 10 & 11 (Letter from Miller to Godkin (Nov. 13, 2018); Letter from Godkin to Miller (Nov. 15, 2018)). Notably, Six4Three and Styleform's counsel could not identify any public sources for the specific factual allegations in the three exemplary violations identified above.

C. An Order to Show Cause, and Expedited Discovery, Are Necessary.

It is apparent that in just the last few weeks, Six4Three and its counsel have repeatedly elected to violate their obligations as litigants and officers of the Court. It is also apparent that Facebook, and most importantly the Court, have no way of knowing the full extent of Six4Three's disclosure of confidential, sealed materials without disclosure from Six4Three and its counsel. Accordingly, Facebook requests that the Court issue:

1 (1) An Order to Show Cause why terminating sanctions and monetary sanctions should not issue
2 in light of Six4Three's multiple violations of this Court's orders, which provide the bedrock
3 for Facebook's—and all parties'—presumption that documents produced pursuant to a
4 protective order will not be misused for purposes other than the litigation at hand. Facebook
5 asks for a hearing as soon as the Court is available following the close of briefing, as
6 proposed above.

7 (2) An order that Six4Three and its counsel produce the following categories of documents on
8 Thursday, November 29, 2018:

- 9 a. All written or recorded communications between Six4Three, including without
10 limitation Ted Kramer, Thomas Scaramellino, David Godkin, James Kruzer, Stuart
11 Gross, and any other agent or representative of Six4Three, on the one hand, and any
12 other individual or entity (other than this Court and Facebook) on the other hand,
13 regarding Facebook's confidential information. For the avoidance of doubt, this
14 includes but is not limited to media organizations and governmental entities, including
15 the Digital, Culture, Media and Sport Committee of the House of Commons.
- 16 b. Documents (e.g., phone logs) sufficient to show all telephonic and/or video conference
17 communications between Six4Three, including without limitation Ted Kramer,
18 Thomas Scaramellino, David Godkin, James Kruzer, Stuart Gross, and any other agent
19 or representative of Six4Three, and any individual or entity (other than this Court or
20 Facebook) regarding Facebook's confidential information. For the avoidance of
21 doubt, this includes but is not limited to media organizations and governmental
22 entities, including the Digital, Culture, Media and Sport Committee of the House of
23 Commons.
- 24 c. Document sufficient to show the identity of all individuals or entities with whom Ted
25 Kramer, David Godkin, James Kruzer, and Stuart Gross, or any other agent or
26 representative of Six4Three, discussed Facebook's confidential information.

27 (3) An order that depositions of the following individuals take place in San Mateo County by
28 Wednesday, December 5, 2018:

- a. Ted Kramer
- b. David Godkin
- c. Stuart Gross
- d. Thomas Scaramellino

Following the depositions, Facebook proposes that Six4Three file an opening brief in response to an Order to Show Cause by Friday, December 7, 2018. Facebook's responsive brief would then be due on Tuesday, December 11, 2018. Facebook requests that the Court set a hearing following the close of briefing at the Court's earliest convenience.

III. CONCLUSION

For the foregoing reasons, Facebook requests that the Court grant its *ex parte* application.

Dated: November 26, 2018

DURIE TANGRI LLP

By: _____



SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM
ZACHARY G.F. ABRAHAMSON

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox,
Javier Olivan, Samuel Lessin, Michael Vernal, and
Ilva Sukhar

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and resident of the State of California. I am employed in San
3 Francisco County, State of California, in the office of a member of the bar of this Court, at whose
4 direction the service was made. I am over the age of eighteen years, and not a party to the within action.
5 My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

6 On November 26, 2018, I served the following documents in the manner described below:

7 **DEFENDANT FACEBOOK, INC.'S EX PARTE APPLICATION FOR AN ORDER**
8 **SETTING AN EXPEDITED BRIEFING SCHEDULE**

9 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
10 Durie Tangri's electronic mail system from lmiller@durietangri.com to the email
addresses set forth below.

11 On the following part(ies) in this action:

12 Stuart G. Gross
13 GROSS & KLEIN LLP
14 The Embarcadero, Pier 9, Suite 100
15 San Francisco, CA 94111
Telephone: 415-671-4628
sgross@grosskleinlaw.com
iatkinsonyoung@grosskleinlaw.com

16 David S. Godkin
17 James Kruzer
18 BIRNBAUM & GODKIN, LLP
280 Summer Street
19 Boston, MA 02210
Telephone: 617-307-6100
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

20 *Attorneys for Plaintiff*
21 *Six4Three, LLC*

22 I declare under penalty of perjury under the laws of the United States of America that the
23 foregoing is true and correct. Executed on November 26, 2018, at San Francisco, California.

24 
25 _____
26 Laura E. Miller
27
28

EXHIBIT 3

Electronically

FILED

By Superior Court of California, County of San Mateo

ON

11/28/2018

By:

/s/ Mia Marlowe

Deputy Clerk

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**DEFENDANT FACEBOOK, INC.'S BRIEF
RE: COURT'S ORDER DATED NOVEMBER
20, 2018**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015

TRIAL DATE: April 25, 2019

CIV533328
DB

Defendant's Brief re:
1519030



TABLE OF CONTENTS

	Page No.
I. INTRODUCTION	1
II. THE COURT SHOULD GRANT DISCOVERY AND ISSUE AN ORDER TO SHOW CAUSE AND PROMPTLY CONDUCT CONTEMPT PROCEEDINGS	5
A. Six4Three and its Counsel Admit They Have Violated This Court's Order	5
B. Immediate Discovery Into the Scope and Extent of Violation of This Court's Orders Is Necessary	6
1. <i>Immediate</i> Document Discovery and Cross-Examination (Via Deposition or Live Evidentiary Hearing) Are Necessary	6
2. Depositions of Six4Three's Counsel Are Essential	8
III. RESPONSES TO THE COURT'S LEGAL QUESTIONS	12
A. Background on Parliamentary Select Committee Powers	12
B. What Authority Does the DCMS Committee Have to Overrule the Court's Orders Without First Seeking Relief From the Court? (Question 3(a))	13
C. What Is the Legal Effect, Under Both United States and United Kingdom Law, of the DCMS Letter to Mr. Kramer? (Question 3(b))	14
D. Is the DCMS Letter Different Than a Summons? (Question 3(c))	15
E. What Issues Under the United States Constitution Are Raised by the DCMS Letter? (Question 3(d))	16
F. What Are the Obligations of the Court Where a House of Commons Committee Orders the Release of Documents in Contravention to the Court's Orders? (Question 3(e))	16
G. What Are the Procedures for Mr. Kramer, Who [Was] Visiting the United Kingdom on Business, to Respond or Object to the DCMS Letter Demand? (See Ex. 1.) (Question 3(f))	17
H. What Are the Contempt Procedures for DCMS for Non-Compliance by Mr. Kramer? (Question 3(g))	18
IV. RESPONSES TO COURT'S FACTUAL QUESTIONS	19
A. Defendant Has Offices in London. Is Defendant Subject to the Jurisdiction of DCMS?	19
B. Has DCMS or Other Committee Served a Similar Demand for Unredacted Copies of Sealed Documents on Defendant? If so, How Has Defendant Responded?	20

TABLE OF AUTHORITIES

Page(s)

Cases

<i>BP Alaska Exploration, Inc. v. Superior Court (Nahama & Weagant Energy Co.),</i> 199 Cal. App. 3d 1240 (1988)	11
<i>Chevron Corp. v. Pennzoil Co.,</i> 974 F.2d 1156 (9th Cir. 1992)	11
<i>Chicago Title Ins. Co. v. Superior Court (Cal. Canadian Bank),</i> 174 Cal. App. 3d 1142 (1985)	8
<i>Garcia v. Progressive Choice Ins. Co.,</i> No. 11-CV-466-BEN (NLS), 2012 WL 3113172 (S.D. Cal. July 30, 2012).....	8
<i>Jones v. Superior Court (Benny),</i> 119 Cal. App. 3d 534 (1981)	8
<i>Pilkington Brothers P.L.C. v. AFG Industries Inc.,</i> 581 F. Supp. 1039 (D. Del. 1984).....	14, 15
<i>Societe Nationale Aerospatiale v.</i> <i>United States District Court for the Southern District of Iowa,</i> 482 U.S. 522 (1987).....	14
<i>Spectra-Physics, Inc. v. Superior Court (Teledyne, Inc.),</i> 198 Cal. App. 3d 1487 (1988)	8
<i>State Farm & Cas. Co. v. Superior Court (Taylor),</i> 54 Cal. App. 4th 625 (1997), (May 1, 1997)	10

Statutes

Cal. Evid. Code § 956(a).....	10
-------------------------------	----

Treaties

Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555 (Mar. 18, 1970)	15
--	----

1 **I. INTRODUCTION**

2 As this Court has already recognized, Mr. Kramer and his counsel explicitly admit they breached
3 this Court's protective and sealing orders and destroyed evidence. What remains is to identify just how
4 extensive that breach was, so that the Court can order all necessary remedies and issue all appropriate
5 sanctions. All the more because Six4Three's explanation of these events raises more questions than it
6 answers.

7 At the outset, Six4Three asks the Court to accept a narrative that is improbable as a matter of
8 common sense and inconsistent with the documents and public facts that are available so far. For
9 example:

- 10 • Mr. Kramer asks the Court to believe that Six4Three was put in an "untenable" situation by the
11 Digital, Culture, Media and Sport Committee ("DCMS Committee") while Mr. Kramer was
12 traveling to the United Kingdom for business. In so doing, he asks the Court to ignore that:
 - 13 ○ Six4Three had been in contact with Mr. Collins and the DCMS Committee since at least
14 October 1, without notifying Facebook or the Court, even at the October 11 hearing on the
15 motions to seal the very materials at issue.
 - 16 ○ While Mr. Kramer gives no information about the business he was in the United Kingdom
17 to undertake, he happened to choose a hotel that is approximately 1500 feet from the
18 House of Parliament and Portcullis House (where the DCMS Committee sits and
19 Members of Parliament offices are located).
 - 20 ○ Six4Three actually *invited* the DCMS Committee to request documents produced in this
21 litigation and to issue a subpoena purporting to compel their production. *See* Declaration
22 of Theodore Kramer in Support of Plaintiff's Brief in Response to November 20, 2018
23 Order ("Kramer Decl.") Ex. 1 at 1 ("Finally, I have attached a document that should assist
24 you and your committee as you approach Facebook for documentation and evidence
25 related to the company's handling of user data since January 1st, 2012. Carole
26 recommended we send it to you.") (attaching a document entitled "Requests for
27 Production_six4three.pdf", which Six4Three has not yet disclosed to the Court or
28

1 Facebook); *see also id.* Ex. 3 (“I can confirm that your description of the documents in my
2 possession is accurate. . . . I will agree to accept service of a subpoena.”).

- 3 • Mr. Kramer asks the Court to believe that, between the time this Court ordered him not to turn the
4 documents over the DCMS Committee and the time he did so (two days later), Mr. Kramer was
5 sufficiently concerned about the legal consequences of declining to provide the documents to the
6 DCMS Committee that he would risk a contempt finding by this Court, even though by his own
7 account:

- 8 ○ Mr. Kramer did not seek legal advice from his lawyers (or lawyers with expertise in
9 parliamentary procedure) about the predicament he claims to have found himself in.
10 Indeed, although Mr. Kramer purports to have “immediately” notified his lawyers upon
11 receiving the first two DCMS Committee orders, he did not think to notify them before
12 taking the documents to Parliament.
- 13 ○ Mr. Kramer allegedly arrived unannounced to the House of Commons and asked to see a
14 Member of Parliament, where he “intended to convince Mr. Collins that he could not
15 force me to turn over documents subject to the Protective Order.” Although he “did not
16 intend to comply with the DCMS Orders,” he brought with him from his nearby hotel an
17 untold number of confidential and highly confidential Facebook documents he should not
18 even have had access to, along with a thumb drive for copying the documents.
- 19 ○ Already knowing that he was subject to contempt of this Court’s orders, Mr. Kramer was
20 apparently more concerned with being held in contempt of the DCMS Committee and
21 searched his cache of documents for documents to provide to the DCMS Committee. He
22 claims he did “not know whether [he] was free to leave the location, or if [he] had been
23 allowed to leave, if [he] would be permitted to fly home to the United States,” but
24 apparently still did not think to ask to speak to his counsel or even to ask whether he was
25 being held against his will by the Member of Parliament (who presumably has no
26 authority to hold a foreign national that had not been charged with or convicted of any
27 crime).
- 28

- 1 ○ Although he had been concerned about the consequences of being held in contempt of
2 Parliament and knew he was subject to being held in contempt by this Court, after handing
3 over an unidentified set of Facebook's confidential documents to the DCMS Committee,
4 he allegedly left the United Kingdom without contacting his counsel. He flew home and
5 enjoyed Thanksgiving with his family without contacting counsel. He waited until two
6 days later to even let his counsel, let alone the Court or Facebook, know that he had
7 disclosed confidential documents to the DCMS Committee in violation of this Court's
8 orders.
- 9 • Six4Three's counsel asks the Court to believe that, upon learning of all of this, counsel was
10 "vexed" by Mr. Kramer's actions, but decided the wisest course of action was to instruct Mr.
11 Kramer to spoliage evidence by *deleting* the Dropbox cache on his computer, notwithstanding
12 that:
- 13 ○ According to Six4Three, the Dropbox cache would have been the only available record of
14 what files Mr. Kramer accessed while he was meeting with the DCMS Committee, since
15 Mr. Kramer claims he has no memory of what he copied for the DCMS Committee.
16 Counsel did not ask the Court or Facebook for input on this issue or even disclose this fact
17 to the Court or Facebook until three days later, with Six4Three November 26, 2018
18 submission.
- 19 • Six4Three's counsel asks the Court to believe that they had no idea that Mr. Kramer had access to
20 confidential or highly confidential Facebook information until Facebook raised a concern on
21 November 19, even though:
- 22 ○ The documents were produced only to Six4Three's counsel and thus could not have gotten
23 to Mr. Kramer unless Six4Three's counsel provided them to him (directly or indirectly).
- 24 ○ Mr. Kramer had confirmed to Mr. Collins on November 4 that he had "in [his]
25 possession" unredacted copies of, among other things, Six4Three's Corrected
26 Memorandum of Points and Authorities in Opposition to Defendants' Special Motions to
27 Strike (Anti-SLAPP) filed on May 18, 2018; the Godkin Anti-SLAPP Declaration; and
28 Exhibits 1-212 to the Godkin Anti-SLAPP Declaration filed on May 18, 2018. *See*

1 Kramer Decl. Ex. 3 (saying “I can confirm that your description of the documents in my
2 possession is accurate” in response to a request from Mr. Collins that Mr. Kramer provide
3 *unredacted* copies of the Six4Three’s opposition brief, the Godkin Declaration, Exhibits
4 1-212 to the Godkin Declaration, and “[a]ll documents containing summaries or analyses
5 of any of the exhibits to the Godkin Anti-SLAPP Declaration filed on May 18, 2018.”).

6 And even accepting the above, a number of questions arise from Six4Three’s submission. By
7 way of example, one wonders:

- 8 • Who was involved in and had knowledge of Six4Three’s communications with *The Guardian* and
9 the DCMS Committee and to what extent? What was in the “summary” Six4Three gave to the
10 DCMS Committee? Who prepared the list of document requests for the DCMS Committee and
11 what was on the list?
- 12 • How did Mr. Kramer get access to Facebook’s highly confidential information in violation of the
13 protective order? Who set up the Dropbox? When? What documents were on it last week?
14 What documents have been on it since it was set up? When did Mr. Kramer set up the syncing
15 between the Dropbox folder and his computer?
- 16 • Who else had access to the Dropbox containing Facebook’s highly confidential information?
17 Who accessed it? When?
- 18 • What happened between the August 28, 2018 meeting between Mr. Kramer and *The Guardian*’s
19 Carole Cadwalladr (at which she reportedly said she would like to raise this case with Damian
20 Collins) and the October 1, 2018 email Mr. Kramer sent to Mr. Collins in which he sent Mr.
21 Collins a list of litigation documents the DCMS Committee should request, he says at Ms.
22 Cadwalladr’s suggestion?
- 23 • Why were the Court and Facebook not given notice of the DCMS Committee’s request for
24 documents (as invited by Six4Three) until November 19, 2018?
- 25 • Why did Mr. Kramer travel to the United Kingdom with Facebook’s confidential and highly
26 confidential information in the first place?
- 27 • Exactly what documents were provided to the DCMS Committee?

- Why did Six4Three’s counsel instruct Mr. Kramer to delete the Dropbox and local copies of it? Were any steps taken to preserve evidence of the contents of the Dropbox, including who accessed those documents, or what documents Mr. Kramer copied to the thumb drive he gave to the DCMS Committee?
- Why did Mr. Kramer fail to notify his own counsel or Facebook at the time he provided the documents to the DCMS Committee in direct violation of this Court’s various orders?
- What other violations of the protective order have occurred?

Facebook requests prompt discovery and an order to show cause so that Facebook—and more importantly the Court—can get to the bottom of what actually happened here.

II. THE COURT SHOULD GRANT DISCOVERY AND ISSUE AN ORDER TO SHOW CAUSE AND PROMPTLY CONDUCT CONTEMPT PROCEEDINGS

The Court’s November 20, 2018 Order for Briefing and Staying Submission of Unredacted Copies of Sealed Documents (“November 20 Order”) posed a number of specific questions as to the authority of the DCMS Committee to compel production of confidential and sealed materials from this litigation. Many of those questions have been overtaken by Six4Three and its counsel’s knowing decisions to violate the Court’s orders in the interim, but Facebook addresses them in Sections III and IV below. First, however, Facebook addresses the admissions in Six4Three’s November 26 submission.

A. Six4Three and its Counsel Admit They Have Violated This Court’s Order

As the Court’s November 27, 2018 Order and Notice of Hearing Concerning Matters Subject to this Court’s Sealing and Protective Orders and Order Issued November 20, 2018 (“November 27 Order”) determined, it is undisputed that Six4Three, Mr. Kramer, and counsel have violated this Court’s orders. At the outset, “Mr. Kramer admits he produced documents subject to the Sealing and Protective Orders from a DropBox account and in violation of the Order.”¹ November 27 Order at 2. Beyond that, Mr.

¹ Of course, the breach did not stop with the *disclosure* of the confidential and sealed documents to the DCMS Committee. On Tuesday, the DCMS Committee held a public, widely-publicized hearing in which the documents disclosed by Mr. Kramer were actually *used* to question a Facebook representative. For example, the Court may recall Exhibit 153 to the Godkin Declaration—an email chain in which a Facebook engineer mistakenly thought calls to Facebook’s servers from Pinterest were originating in Russia, but then quickly realized his mistake and advised it was a false alarm. The first part of the email

1 Gross has admitted that “documents designated as highly confidential under the Protective Order, as well
2 as summaries of such documents, had been placed in a folder located in Six4Three’s dropbox account
3 over which Mr. Kramer had access,” which itself, despite counsel’s transparent use of the passive voice
4 to avoid responsibility, is a separate violation of the Protective Order. Declaration of Stuart G. Gross in
5 Support of Plaintiff’s Brief in Response to November 20, 2018 Order (“Gross Decl.”) ¶ 7. These are just
6 the violations that Six4Three has admitted to. The remainder of its November 26 submission only
7 heightens concerns that there are other serious violations of this Court’s orders that have not yet come to
8 light.

9 **B. Immediate Discovery Into the Scope and Extent of Violation of This Court’s Orders**
10 **Is Necessary**

11 **1. Immediate Document Discovery and Cross-Examination (Via Deposition or**
12 **Live Evidentiary Hearing) Are Necessary**

13 As set forth in Facebook’s November 26 Ex Parte Application For Expedited Relief Re
14 Six4three’s Contempt, Including An Order To Show Cause (“November 26 Ex Parte Application”),
15 immediate document discovery and cross-examination of the relevant individuals is necessary to get to
16 the bottom of Six4Three’s violation of the Court’s orders. Facebook does not repeat here its argument
17 with respect to the scope of discovery that is necessary, but addresses two supplementary points.

18 *First*, based on the revelations in Six4Three’s November 26 submission, Facebook respectfully
19 submits that the Court and Facebook needs the following discovery beyond that previously requested in
20 Facebook’s November 26 Ex Parte Application to determine the scope of the breaches:

- 21 • The three attachments to Mr. Kramer’s October 1, 2018 email to Damian Collins. *See* Kramer
22 Decl. Ex. 1.
- 23 • All logs or other records pertaining to the Six4Three Dropbox account that Mr. Kramer accessed
24 from his laptop, including all available or recoverable information about what documents were

25 chain was raised during Tuesday’s hearing, forcing Facebook to release the entire Exhibit 153 to provide
26 the media and public with appropriate context. *See* <https://www.cnn.com/2018/11/27/tech/facebook-hearing-damian-collins/index.html> (“Later on Tuesday, Facebook released a copy of the email chain with
27 the engineer’s warning. The full chain showed that the engineer appears to have been mistaken. . . . It is
28 not clear if the committee had access to the entire chain or just the emails in which the engineer initially
raised the false alarm. CNN has asked the committee to clarify.”).

1 uploaded to the account and by whom, what documents were downloaded from the account and
2 by whom, what documents were deleted from the account and by whom, when the account was
3 cached or synched locally and on what devices, and all individuals that had access to the account
4 and when.

- 5 • All emails or other communications amongst and between Mr. Gross or anyone at Gross & Klein,
6 Mr. Godkin or anyone at Birnbaum Godkin, Mr. Kramer, Mr. Scaramellino or any other agent,
7 attorney, or individual associated with Six4Three from May 21, 2018 to the present regarding
8 Facebook's confidential or highly confidential information. For avoidance of doubt, this would
9 include without limitation communications relating to contacts with the DCMS Committee, *The*
10 *Guardian*, or other third parties. To the extent Six4Three may previously have purported to assert
11 a claim of privilege over such communications, any such claim is non-viable for the reasons set
12 forth below in Section II.B.2.
- 13 • A forensic analysis of Mr. Kramer's laptop and the thumb drive (if it is still in his control), as
14 well as the computers and/or electronic devices of Six4Three's counsel and any other individual
15 that had access to Six4Three's Dropbox account.

16 **Second**, that Six4Three and its counsel produce the requested discovery by 5:00 p.m. on
17 November 29, 2018 or, in view of the November 30 hearing, by 5:00 p.m. on Monday, December 3. In
18 particular, Six4Three's suggestion that it should be given until **December 28** to produce discovery should
19 be rejected in these circumstances. *See* Plaintiff's Limited Response, In Part, to Defendants' Ex Parte
20 Application for Expedited Relief re Six4three's Contempt, Including an Order to Show Cause at 3.
21 Given counsel's admission that he directed the destruction of critical evidence relating to these matters,
22 delaying the production of relevant information by another month only risks that additional relevant
23 information will be lost or destroyed. Moreover, Mr. Kramer has already said he cannot remember the
24 materials he turned over to DCMS Committee just last week—delaying depositions until January (which
25 would be necessary if the documents are not even produced until December 28) risks further claims that
26 memories have faded. *See* Kramer Decl. ¶ 18. And perhaps most importantly, delaying discovery
27 impedes the Court and Facebook learning the true extent of disclosure of Facebook's confidential
28 information—delaying any potential remedial measures and risking further disclosures with every

1 passing day. Against that backdrop, there is no good reason that discovery should not proceed
2 immediately. And Six4Three has not offered any.

3 2. Depositions of Six4Three's Counsel Are Essential

4 The depositions of Six4Three's counsel are essential. There is no dispute that the Court and
5 Facebook are in this predicament *solely* because Six4Three's counsel violated the Stipulated Protective
6 Order and granted Mr. Kramer access to documents that he should not have had access to. *But for*
7 *counsel's violation of the Stipulated Protective Order, Mr. Kramer's subsequent trampling of this*
8 *Court's Orders never could have occurred.* Moreover, Mr. Kramer and Mr. Gross have both attested
9 that Mr. Kramer destroyed evidence relating to his violation of the Court's orders *at the direction of*
10 *counsel.* See Kramer Decl. ¶ 24; Gross Decl. ¶ 11.

11 As Six4Three concedes, a party may depose opposing counsel where: (1) counsel's testimony is
12 not privileged; (2) the testimony is crucial to the case; and (3) there is no other way to get the
13 information. *Spectra-Physics, Inc. v. Superior Court (Teledyne, Inc.)*, 198 Cal. App. 3d 1487, 1496
14 (1988). Here, there is no privilege for two reasons.

15 *First*, Six4Three expressly waived privilege over communications relating to these issues by
16 disclosing a limited set of communications that it apparently believes are favorable. *Jones v. Superior*
17 *Court (Benny)*, 119 Cal. App. 3d 534, 547–48 (1981), *disapproved of on other grounds by Williams v.*
18 *Superior Court (Marshall's of CA, LLC)*, 3 Cal. 5th 531, 557 n.8 (2017) (“Where the disclosure sought is
19 so related to the disclosure already made that the [privilege holder] could not reasonably retain a privacy
20 interest in preventing it, then the purpose of the privilege no longer exists, and it may be said that the
21 privilege has been waived.”); *see also Chicago Title Ins. Co. v. Superior Court (Cal. Canadian Bank)*,
22 174 Cal. App. 3d 1142, 1151 (1985) (holding that when plaintiff placed at issue its knowledge of the
23 alleged fraud, it waived attorney-client privilege as to all communications between plaintiff and its
24 employees related to that knowledge); *Garcia v. Progressive Choice Ins. Co.*, No. 11-CV-466-BEN
25 (NLS), 2012 WL 3113172, at *4–*7 (S.D. Cal. July 30, 2012) (applying California privilege law to
26 conclude that the disclosure of certain privileged emails relating to an insurance claim waived privilege
27 as to other emails involving the same insurance claim). Indeed, Six4Three has offered up its
28 communications on four broad categories of information that are necessary to determine what happened

1 here. It is critical to note that Six4Three, *not Facebook*, bears the burden of establishing privilege, and it
2 made no effort to do so in any of its papers.

- 3 • As to who created the Dropbox account at issue, what controls were enabled (or not), and when
4 Mr. Kramer and others accessed it, Six4Three waived privilege as to where, when, and how they
5 learned about the relevant facts. Counsel claims they did not learn that Mr. Kramer had access
6 until November 20, 2018. Gross Decl. ¶ 7; Godkin Decl. ¶ 6. But that is contrary to Mr.
7 Kramer's sworn declaration under penalty of perjury that *in May 2018*, he told a reporter that the
8 documents were "stored on a file server in the cloud." Kramer Decl. ¶ 3. Counsel *never* claim
9 that they were unaware of this communication.
- 10 • As to counsel's communications relating to Mr. Kramer about his access to the Dropbox account,
11 his review of Facebook's documents, and "confirmation" that Mr. Kramer had not reviewed the
12 documents, counsel again waived privilege. Counsel openly states that they "confirmed Mr.
13 Kramer had never reviewed any documents designated as highly confidential." Gross Decl. ¶ 8;
14 Godkin Decl. ¶ 8. Counsel also argues that they did not know that the Dropbox was set up to
15 synch to the laptop that was in Mr. Kramer's possession. Gross Decl. ¶ 8; Godkin Decl. ¶ 9.
16 Again, counsel's arguments are contrary to the documents. On November 4, 2018, weeks before
17 Six4Three notified the Court or Facebook of the DCMS Committee's demands, Mr. Kramer
18 wrote to the DCMS Committee: "I can confirm that your description of the documents *in my*
19 *possession* is accurate. These documents are subject to confidentiality under the protective
20 order" Kramer Decl. Ex. 3 (emphasis added). Notably Six4Three's counsel claims
21 ignorance of some communications but *not* this one.
- 22 • As to counsel's communications relating to the sharing of documents with the DCMS Committee,
23 counsel now claims that they did not learn of it until November 23, 2018. Gross Decl. ¶¶ 9–10;
24 Godkin Decl. ¶ 17. Counsel states that they made efforts to prevent "Mr. Kramer from taking
25 such actions." Gross Decl. ¶ 10. Of course, counsel has not attached *any* documents or records
26 of communications showing that they were either surprised by the disclosure or that there was *a*
27 *single* instruction to Mr. Kramer not to make it. Rather, counsel simply claims that his
28

1 administrative assistant forwarded his communications with the Court and the DCMS Committee
2 to Mr. Kramer. *See* Godkin Decl. ¶¶ 4, 11, 13.

- 3 • Finally, as to the destruction of documents, counsel admits that they directed the destruction of
4 key evidence: the Dropbox that Mr. Kramer used to synch documents, to search documents, and
5 to disclose documents. Gross Decl. ¶ 11.

6 **Second**, Mr. Kramer's communications show a coordinated effort—with input from counsel—to
7 circumvent at the very least this Court's order sealing the documents at issue. Thus, even if Six4Three
8 had not waived privilege on these subjects by putting communications between counsel and Mr. Kramer
9 directly at issue in the three declarations submitted on November 26, the crime-fraud exception applies
10 here. "There is no privilege under this article if the services of the lawyer were sought or obtained to
11 enable or aid anyone to commit or plan to commit a crime or a fraud." Cal. Evid. Code § 956(a). The
12 facts here are more than sufficient to make out a prima facie case that the services of counsel were sought
13 and obtained "to enable or aid anyone to commit or plan to commit a crime or a fraud"—and a prime
14 facie case is all that is required to invoke the crime-fraud exception. *State Farm & Cas. Co. v. Superior*
15 *Court (Taylor)*, 54 Cal. App. 4th 625, 643 (1997), *as modified* (May 1, 1997).

16 Within days of this Court's unequivocal order rejecting Six4Three's long-standing effort to
17 unseal these documents, Six4Three started the process of finding another way to disclose the documents.
18 The communications from Mr. Kramer make it painfully obvious that he was working with advice of
19 counsel. On November 4, 2018—***just three days after this Court sealed the documents in question***—
20 Mr. Kramer agreed to accept a subpoena from the DCMS Committee. Kramer Decl. Ex. 3. Mr. Kramer,
21 however, explained that he would need to give notice under the protective order, which neither he nor
22 counsel did, even though they were already in receipt of requests for documents. *Id.* Mr. Kramer also
23 stated that a member of his legal team would need to be on any calls. *Id.* Thus, it is no surprise that
24 neither Mr. Kramer nor counsel denies that they were working together on this communication.
25 Similarly, neither Mr. Kramer nor counsel claims that they were not working together on
26 communications with the media, including the meetings with *The Guardian*. Kramer Decl. ¶¶ 3–4, 10,
27 Exs. 5–6.
28

1 On November 12, 2018, Mr. Kramer carefully instructed the DCMS Committee that he needed
2 more than a request for voluntary disclosure; he told the Committee that he could not “*voluntarily*
3 disclose the materials you have requested as they are subject to a protective order in California Superior
4 Court.” Kramer Decl. Ex. 4 (emphasis added); *see also id.* Ex. 3 (agreeing to accept service of a
5 subpoena and noting “Upon receipt of any subpoena, I would be required to notify Facebook. If
6 Facebook wishes to prevent my compliance, it will need to take action in appropriate fora.”). Again, it is
7 no surprise that there is no suggestion that this communication was written without input from counsel.
8 Indeed, Mr. Kramer does not claim that he acted without advice of counsel until November 21, 2018.
9 Kramer Decl. ¶ 15.

10 In sum, the documents show a coordinated effort by Mr. Kramer and his counsel to invite a
11 foreign Committee to issue a non-voluntary order in conflict with this Court’s orders without giving this
12 Court or Facebook notice. The “fraud” that gives rise to the crime-fraud exception includes a fraud on
13 the Court, and that is exactly what happened here. *BP Alaska Exploration, Inc. v. Superior Court*
14 (*Nahama & Weagant Energy Co.*), 199 Cal. App. 3d 1240, 1263 (1988).

15 Turning to the remaining factors that justify the depositions of counsel, testimony on these
16 subjects is critical. Without the testimony of counsel, there is no way for the Court or Facebook to get to
17 the bottom of what happened and why. Counsel only claims ignorance of some communications and not
18 others. And importantly, counsel does not claim ignorance of the many emails from weeks ago in which
19 Mr. Kramer used legalese to communicate with the DCMS Committee in an effort to kick off this entire
20 melee. It is equally noteworthy that counsel has not submitted a single document supporting their alleged
21 lack of knowledge about the Dropbox account or a single document actually instructing Mr. Kramer not
22 to disclose documents. In short, counsel is disclosing facts they like without allowing the Court or
23 Facebook to test them—a quintessential use of attorney-client communications as a sword, barring
24 reliance on privilege as a shield. *See, e.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.
25 1992).

26 **Second**, there is no other way to get this information than from counsel in depositions. Only
27 counsel knows where, what, and with whom they communicated on these subjects. Unless counsel is
28 withholding documents from the Court (i.e., purposefully not attaching relevant communications to their

1 declarations), many communications apparently were oral. And Six4Three's decision to withhold notice
2 until the eve of the disclosure here means that there is no time for slower methods; we need to get to the
3 bottom of this now.

4 **III. RESPONSES TO THE COURT'S LEGAL QUESTIONS²**

5 **A. Background on Parliamentary Select Committee Powers**

6 The DCMS Committee is a parliamentary select committee of the House of Commons. *See*
7 Miller Decl. Ex. 2 (Letter from Speaker's Counsel to Godkin (Nov. 23, 2018)) at 1. Its powers, including
8 investigatory powers, are derived from internal parliamentary standing orders and resolutions of
9 Parliament. Gordon Decl. ¶ 5. These powers are fundamentally distinct from United Kingdom *law*,
10 decided and enforced by the United Kingdom courts, whose power derives from statute, the common
11 law, and equity. *Id.*

12 As such, select committee proceedings operate entirely separate from the United Kingdom legal
13 system. Gordon Decl. ¶ 12. An order from the DCMS Committee for the production of documents
14 cannot be enforced through a court of law in the United Kingdom. *Id.* Indeed, there is no process
15 recognized in the law of the United Kingdom for enforcing an order of a select committee. Gordon Decl.
16 ¶ 13. As explained in more detail below, the established process for enforcing an order of a select
17 committee to produce documents is to refer the purported breach to the House of Commons as a whole.
18 *Id.* In modern history, enforcement actions with respect to a finding of contempt of Parliament are rare,
19 and the scope of the process is uncertain and its effectiveness limited. *Id.*

20 Following from the constitutional separation of the United Kingdom Parliament and courts of
21 law, if confidential documents are disclosed to a select committee, there are no legal constraints upon the
22 use of those documents by the select committee in performance of its functions, including making the
23 documents public. Gordon Decl. ¶ 14. Because the United Kingdom courts will not intervene to restrain
24

25 ² To address the Court's legal questions regarding parliamentary procedure, Facebook includes with this
26 brief a declaration from Richard Gordon, a practicing barrister holding the title of Queen's Counsel. Mr.
27 Gordon is a specialist in United Kingdom constitutional and administrative law. *See* Ex. 1 to the
28 Declaration of Laura E. Miller submitted herewith ("Miller Decl."), Declaration of Richard Gordon,
Queen's Counsel ("Gordon Decl.") ¶¶ 1-2.

1 the use and disclosure of confidential documents, the consequences of disclosure to the select committee
2 may be irreparable. *Id.*

3 **B. What Authority Does the DCMS Committee Have to Overrule the Court's Orders**
4 **Without First Seeking Relief From the Court? (Question 3(a))**

5 Facebook does not understand the DCMS Committee to have expressly overruled the Court's
6 orders regarding the confidentiality of the Facebook information at issue. Rather, the DCMS
7 Committee's position is that *it* is not bound by orders of this Court. *See* Miller Decl. Ex. 2 (Letter from
8 Speaker's Counsel to Kramer (Nov. 23, 2018)) at 2 ("It would have been wholly inappropriate for [the
9 DCMS Committee] to make prior application to a court in California, which does not exercise authority
10 over Parliament's exercise of its functions in the United Kingdom"); *id.* at 1 ("We regret that we are
11 unable to brief the court directly; it would be improper for us to do so as we have no standing in the case
12 and the House of Commons is not within the jurisdiction of the court.").

13 The corollary to this position is that the DCMS Committee does not assert and cannot exercise
14 any authority over this Court and this Court is not bound by any action taken by the DCMS Committee in
15 the United Kingdom. Indeed, the DCMS Committee made this very point to Mr. Kramer when it first
16 asked for these documents, prior to Mr. Kramer's recent trip to the United Kingdom. Specifically, Mr.
17 Collins warned Mr. Kramer:

18 I should highlight that, if any disclosure of this material to the Committee
19 has consequences in the US courts, the Committee cannot protect you.
20 Committee proceedings are subject to parliamentary privilege in the United
21 Kingdom under Article IX of the 1689 Bill of Rights, but this legislation
does not have extraterritorial effect and could not be expected to be upheld
in a US court.

22 Miller Decl. Ex. 3 (Letter from Collins to Kramer (Nov. 6, 2018)). Indeed, there does not appear to be
23 any dispute that Mr. Kramer remained bound by the provisions of the Stipulated Protective Order, the
24 Court's sealing orders, and the November 20 Order, notwithstanding the requests from the DCMS
25 Committee. And yet, he still travelled to the United Kingdom (and, specifically, went to the House of
26 Commons) with a thumb drive for easy transfer of files and copies on his laptop of confidential and
27 highly confidential documents that he was not allowed access to under the terms of the Stipulated
28 Protective Order and that this Court had ordered sealed.

1 **C. What Is the Legal Effect, Under Both United States and United Kingdom Law, of the**
2 **DCMS Letter to Mr. Kramer? (Question 3(b))**

3 Just as the DCMS Committee's order has no legal effect within the United Kingdom courts, *see*
4 Gordon Decl. ¶ 16, it also has no legal effect within the court systems of the United States, including the
5 California courts. As noted above, the DCMS Committee specifically warned Mr. Kramer that
6 compliance with its requests to disclose Facebook's confidential information could have consequences in
7 the United States courts. Miller Decl. Ex. 3 (Letter from Collins to Kramer (Nov. 6, 2018)).

8 **First**, the cases cited by Six4Three regarding the principle of international comity have no
9 application here. The cases discussed by Six4Three all involve United States federal courts deciding
10 whether to either compel discovery from a foreign entity or issue an injunction already imposed by a
11 foreign court on a foreign entity. *See* Plaintiff's Brief in Response to November 20, 2018 Order ("643
12 Br.") at 11–12. As Six4Three itself admits, that is not the situation we have here. 643 Br. at 11 ("The
13 Supreme Court has provided a multi-factor balancing test for determining when U.S. courts should
14 exercise their authority to compel production of evidence constrained by foreign law, the inverse of the
15 situation here.").

16 Six4Three's brief also provides no guidance to the Court (or Facebook) as to why it believes this
17 doctrine applies to the potential contempt and sanctions proceedings against Six4Three, Mr. Kramer, and
18 Six4Three's counsel. Here, Mr. Kramer knowingly violated preexisting orders from this Court.
19 Six4Three's counsel also violated orders from this Court, although they deny it was knowingly. In both
20 cases, the issue at hand is whether this Court can enforce its *own* orders against the principal of the
21 *plaintiff in this lawsuit* (who also happens to be a California resident), and against lawyers appearing
22 before the Court (who are admitted in California or admitted *pro hac vice*). This has nothing to do with
23 the balancing test set forth in *Societe Nationale Aerospatiale v. United States District Court for the*
24 *Southern District of Iowa*, 482 U.S. 522 (1987), which addresses "the extent to which a federal district
25 court must employ the procedures set forth in the [Hague] Convention when litigants seek answers to
26 interrogatories, the production of documents, and admissions from a French adversary over whom the
27 court has personal jurisdiction." *Id.* at 524. Similarly, *Pilkington Brothers P.L.C. v. AFG Industries Inc.*,
28 581 F. Supp. 1039 (D. Del. 1984), does not inform the matters before this Court. As Six4Three itself

1 notes, that case dealt with the question of “whether an American court *must* duplicate a foreign interim
2 injunction, without reference to the underlying dispute, where there are ongoing and continuous
3 violations of that foreign injunction.” *Id.* at 1042 (emphasis added). Needless to say, there is no foreign
4 injunction for this Court to duplicate here. Mr. Kramer disclosed Facebook’s confidential information in
5 willful defiance of several of this Court’s orders and the Court retains its full power and authority to
6 address that act of contempt.

7 *Second*, as discussed above, the orders of a select committee have no legal effect outside the
8 powers of Parliament, including in the United Kingdom courts of law. There is no foreign *law* that
9 conflicts with this Court’s multiple orders prohibiting Six4Three (and therefore Mr. Kramer) from
10 disclosing Facebook’s confidential information.

11 *Third*, Six4Three’s references to the Hague Convention fare no better. The Evidence Section of
12 the Hague Convention is expressly limited to *judicial* bodies of the signatory nations. *See* Convention of
13 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, art. 1, 23 U.S.T. 2555
14 (“In civil or commercial matters a *judicial authority* of a Contracting State may, in accordance with the
15 provisions of the law of that State, request the competent authority of another Contracting State, by
16 means of a Letter for Request, to obtain evidence, or to perform some other judicial act.”) (emphasis
17 added). Moreover, the DCMS Committee did not go through the specific procedures set forth in the
18 Hague Convention, which would have given Facebook the opportunity to object and otherwise respond.

19 **D. Is the DCMS Letter Different Than a Summons? (Question 3(c))**

20 Put simply, the November 19, 2018 DCMS Committee letter to Mr. Kramer was not a summons.
21 The DCMS Committee does not dispute this. *See* Miller Decl. Ex. 2 (Letter from Speaker’s Counsel to
22 Kramer (Nov. 23, 2018)) at 2 (The letter “is not issued by a court but by Parliament.”). It is not an order
23 under the laws of the United Kingdom. And although Mr. Kramer walked to the House of Commons to
24 discuss the matter with Mr. Collins, the letter did not compel Mr. Kramer to do so or appear and testify.
25 *Id.* (“The Committee did not require the personal attendance of Mr. Kramer in this case.”).

1 **E. What Issues Under the United States Constitution Are Raised by the DCMS Letter?**
2 **(Question 3(d))**

3 Facebook does not believe that the correspondence between Mr. Kramer and the DCMS
4 Committee—which Mr. Kramer initiated—directly implicates any issues under the United States
5 Constitution. Contrary to Six4Three’s assertion, Mr. Kramer’s due process rights under the United States
6 Constitution were not infringed and he has not been denied the “right to be heard.” 643 Br. at 12–13.
7 Mr. Kramer has every right to be heard by this Court, and indeed will be heard at the hearing scheduled
8 for this Friday, November 30, 2018. *See* November 27 Order at 2.

9 And although it does not implicate his due process rights under the United States Constitution,
10 under established procedures of the U.K. Parliament, before actually being found in contempt, Mr.
11 Kramer would have been given an opportunity to present his arguments before the House of Commons
12 Committee on Standards and Privileges (the “Committee of Privileges”) had he chosen to comply with
13 this Court’s orders. Gordon Decl. ¶ 19; Miller Decl. Ex. 4 (Letter from Brasted to Speaker’s Counsel
14 (Nov. 27, 2018)); *id.* Ex. 3 (Letter from Collins to Kramer (Nov. 6, 2018)) & Ex. 5 (Letter from Collins
15 to Kramer (Nov. 21, 2018)).³ There is no evidence that Mr. Kramer or Six4Three’s counsel consulted
16 counsel in the United Kingdom or did anything at all to investigate their obligations in response to the
17 DCMS Committee’s request and this Court’s orders (other than Mr. Kramer, a non-lawyer, allegedly
18 Googling parliamentary procedure). *See* Kramer Decl. ¶ 15.

19 **F. What Are the Obligations of the Court Where a House of Commons Committee**
20 **Orders the Release of Documents in Contravention to the Court’s Orders? (Question**
21 **3(e))**

22 Facebook does not believe that the Court has any particular obligation where a select committee
23 of the House of Commons orders the release of confidential documents in contravention of the Court’s
24 orders. As discussed above, the orders of a select committee of Parliament have no legal effect in the
25 United Kingdom’s courts of law, let alone in federal and state courts of the United States. And as the
26 DCMS Committee agrees, its actions did not overrule or otherwise implicate this Court’s prior orders,
27 nor did it deprive this Court of its authority to enforce its orders. *See* Miller Decl. Ex. 2 (Letter from
28

³ A discussion of the parliamentary practice on contempt proceedings is below.

1 Speaker's Counsel to Kramer (Nov. 23, 2018)) at 2. For that reason, and the reasons addressed above,
2 Six4Three's reliance on "the judicial principle of international comity" is again misplaced.

3 **G. What Are the Procedures for Mr. Kramer, Who [Was] Visiting the United Kingdom**
4 **on Business, to Respond or Object to the DCMS Letter Demand? (See Ex. 1.)**
5 **(Question 3(f))**

6 Although there are no express provisions for a person directed by an order of a select committee
7 to respond or object to such an order, modern practice would allow such a person to respond to an
8 investigation into whether there was a contempt of Parliament prior to the full House of Commons
9 making any finding of contempt. Gordon Decl. ¶¶ 18–19. A detailed description of contempt procedures
10 in the House of Commons is provided in response to question 3(g) below.

11 Six4Three attempts to put the onus on Facebook to "defend against disclosure of designated
12 documents in the event they are demanded under legal compulsion by a third party" with reference to
13 Paragraph 16 of the Stipulated Protective Order. *See* 643 Br. at 13–14. But that is not what the
14 Stipulated Protective Order says, and Mr. Kramer was not facing "legal compulsion."⁴ Paragraph 16 of
15 the Stipulated Protective Order only applies to "*a subpoena or a court order issued in other litigation*
16 that compels disclosure of any Confidential Information or Highly Confidential Information." Miller
17 Decl. Ex. 6 ¶ 16 (emphasis added). As Facebook made clear to Six4Three's counsel immediately upon
18 notice of the DCMS Committee letter of November 19, 2018, the DCMS Committee letter is not "a
19 subpoena or a court order issued in other litigation." And the DCMS Committee is not a court of law,
20 but rather a select committee of Parliament. Paragraph 16 has no application here. That said, Paragraphs
21 4 and 5 of the Stipulated Protective Order—which require prior written consent of the designating party

22 ⁴ In his original letter of November 19, Mr. Godkin raised this same provision of the Stipulated
23 Protective Order. Miller Decl. Ex. 7 (Letter from Godkin to Collins (Nov. 19, 2018)). Following the
24 subsequent correspondence from Facebook's counsel on the same day, Six4Three's counsel apparently
25 agreed that Paragraph 16 of the Stipulated Protective Order did not apply to the DCMS Committee's
26 Order. Specifically, Mr. Godkin told the DCMS Committee on November 21, 2018—the day that Mr.
27 Kramer disclosed Facebook confidential information to the DCMS Committee—that "Mr. Kramer is
28 bound by the Protective Order and has no choice but to comply with it. In addition, the attached Order
[from November 20, 2018] further prevents Mr. Kramer from transmitting, releasing or submitting
unredacted copies of Plaintiff's opposition to [motions to strike] until further order of the Court, and
provides that failure to comply will be considered an act of contempt." Miller Decl. Ex. 8 (Letter from
Godkin to Collins (Nov. 21, 2018)).

1 before protected materials can be disclosed to any person not cleared under the Stipulated Protective
2 Order—remained applicable throughout.

3 **H. What Are the Contempt Procedures for DCMS for Non-Compliance by Mr.**
4 **Kramer? (Question 3(g))**

5 The DCMS Committee does not itself enforce its orders. *See* Gordon Decl. ¶ 13; *accord* Miller
6 Decl. Ex. 2 (Letter from Speaker’s Counsel to Kramer (Nov. 23, 2018)) at 3.

7 Rather, the established procedure for enforcing an order of a select committee is as follows:

- 8 a. The select committee must first make a special report to the House of Commons.
- 9 b. The House as a whole then debates whether to refer the matter to the Committee of
10 Privileges.
- 11 c. The Committee of Privileges decides whether or not to recommend to the full House of
12 Commons that a contempt of Parliament has been established and the suggested penalty, if
13 any.
- 14 d. The full House of Commons must then decide whether to accept the recommendation of
15 the Committee of Privileges, and, if contempt is found, determine the appropriate penalty.

16 *See* Gordon Decl. ¶ 25; *accord* Miller Decl. Ex. 4 (Letter from Brasted to Speaker’s Counsel (Nov. 27,
17 2018)); *id.* Ex. 5 (Letter from Collins to Kramer (Nov. 21, 2018)).

18 Here, to the best of Facebook’s current understanding, the DCMS Committee reported Mr.
19 Kramer’s initial decision to abide by this Court’s orders to the full House of Commons, but no
20 subsequent action was taken against Mr. Kramer. *See* Miller Decl. Ex. 5 (Letter from Collins to Kramer
21 (Nov. 21, 2018)); *id.* Ex. 2 (Letter from Speaker’s Counsel to Kramer (Nov. 23, 2018)).

22 The elements of a contempt of Parliament finding have not been systematically defined. *See*
23 Gordon Decl. ¶ 26. It is not the case that *any* failure to comply with an order for production of
24 documents automatically amounts to contempt. *Id.* Rather, the House of Commons has stated that the
25 exercise of its jurisdiction should be used “as sparingly as possible” and only when “the House is
26 satisfied that to exercise it is essential in order to provide reasonable protection for the House, its
27 Members or its officers, from such *improper* obstruction as is causing, or is likely to cause, substantial
28 interference with the performance of their respective functions.” Gordon Decl. ¶ 27 (quoting Resolution

1 of the House of Commons on 6 February 1978). Here, Mr. Kramer had a compelling reason not to
2 comply with the DCMS Committee's order in that this Court had expressly ordered him not to disclose
3 Facebook's confidential materials, and that he would face contempt proceedings in California if he
4 complied. *See* Gordon Decl. ¶¶ 28–29.

5 Further, if Mr. Kramer or his counsel had taken the prudent measure of engaging counsel in the
6 United Kingdom (or had done basic diligence on the relevant rules), they would presumably have learned
7 that, although the House of Commons has the power to fine, admonish, or imprison in theory upon a
8 finding of contempt, that power has not been exercised in over *a century*. The last fine was imposed in
9 1666, Gordon Decl. ¶ 30, more than a century before the thirteen American colonies declared
10 independence from King George III. The last imprisonment for contempt (of a non-member of
11 Parliament) was in 1880. *Id.* Indeed, the Committee of Privileges has expressed doubt as to whether the
12 power to fine or imprison still exists. *Id.* (citing Committee of Privileges Committees' 14th Report of
13 Session 2010–2011 Privileges: Hacking of Members' Mobile Phones). Contrary to Mr. Kramer's claims,
14 he was in no imminent danger of fines or imprisonment as a practical matter, and he would have been
15 disabused of any such belief had he or counsel taken the reasonable and simple step of investigating these
16 issues before Mr. Kramer violated this Court's orders.

17 IV. RESPONSES TO COURT'S FACTUAL QUESTIONS

18 In its November 20 Order, the Court asked Facebook to answer two additional questions.

19 A. Defendant Has Offices in London. Is Defendant Subject to the Jurisdiction of 20 DCMS?

21 Defendant Facebook, Inc. is incorporated in Delaware and has a principal place of business in San
22 Mateo County. While the DCMS Committee does not have jurisdiction over Facebook, Inc., Facebook
23 has engaged extensively with the DCMS Committee over the course of its inquiry, answering hundreds
24 of questions, including during many hours of oral evidence by multiple senior individuals. Facebook UK
25 is located in London and therefore subject to Parliament's jurisdiction.

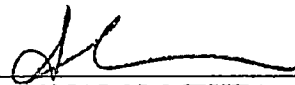
1 **B. Has DCMS or Other Committee Served a Similar Demand for Unredacted Copies of**
2 **Sealed Documents on Defendant? If so, How Has Defendant Responded?**

3 At no time has the DCMS Committee requested from Facebook, or any of its subsidiaries, the
4 documents listed in its November 19, 2018 letter to Mr. Kramer.

5 Dated: November 28, 2018

DURIE TANGRI LLP

6
7 By: _____


SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM

8
9 Attorneys for Defendants
10 Facebook, Inc., Mark Zuckerberg, Christopher Cox,
11 Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya
12 Sukhar
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On November 28, 2018, I served the following documents in the manner described below:

**DEFENDANT FACEBOOK, INC.'S BRIEF RE: COURT'S ORDER DATED
NOVEMBER 20, 2018**

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from cortega@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

Stuart G. Gross
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
Telephone: 415-671-4628
sgross@grosskleinlaw.com
iatkinsonyoung@grosskleinlaw.com

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
Telephone: 617-307-6100
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

*Attorneys for Plaintiff
Six4Three, LLC*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 28, 2018, at San Francisco, California.


Christina Ortega

EXHIBIT 4

1 INFORMATION OUT IN THE PUBLIC DOMAIN BECAUSE ITS PARTICULAR TO
2 THIS LAWSUIT AND IT WAS UNDER SEAL. AND PURSUANT TO A
3 PROTECTIVE ORDER, CORRECT?

4 MS. MEHTA: THAT'S ABSOLUTELY CORRECT, YOUR HONOR.
5 AND THE QUESTION IS WHEN DID THE FOLKS ON THE OTHER SIDE?
6 WHETHER IT BE MR. KRAMER, MR. SCARAMELLINO, THE LAWYERS.
7 EXACTLY WHO AND TO WHAT EXTENT WAS THE PLAN THAT INFORMATION
8 THAT WAS CONFIDENTIAL OR HIGHLY CONFIDENTIAL COULD BE USED FOR
9 OR ULTERIOR PURPOSES BEYOND THE LITIGATION OF THIS DISPUTE
10 BEFORE THIS COURT. AND GIVEN ALL THE THIRD PARTY
11 COMMUNICATION ON THEIR PRIVILEGE LOG, GIVEN THE FACT THAT THEY
12 WERE AFFIRMATIVELY WORKING TO DEDESIGNATE INFORMATION THAT IT
13 COULD GO INTO MR. KRAMER'S HANDS, THERE IS A STRONG REASON TO
14 BELIEVE THAT THIS PLOT WAS HATCHED LONG BEFORE MR. KRAMER'S
15 CONVENIENT TRIP TO THE UNITED KINGDOM.

16 ESPECIALLY WHEN YOU COUPLE THAT WITH THE FACT THAT
17 HE WAS TELLING PEOPLE IN MAY OF THIS YEAR THAT HE HAD
18 CONFIDENTIAL INFORMATION IN HIS POSSESSION IN THE CLOUD. AND
19 THEN WORKED OVER THE COURSE OF WEEKS WITH THE DCMS COMMITTEE
20 TO GENERATE THOSE ORDERS.

21 WE NEED TO GET TO THE BOTTOM. AND RESPECTFULLY,
22 YOUR HONOR, YOU NEED TO GET TO THE BOTTOM OF WHEN DID THIS ALL
23 START? WHO WAS INVOLVED? AND TO WHAT EXTENT BECAUSE YOUR
24 HONOR NEEDS TO KNOW AND FACEBOOK NEEDS TO KNOW WHAT EXACTLY IS
25 OUT THERE? WHO MIGHT HAVE IT? WHAT REMEDIAL MEASURES SHOULD
26 BE TAKEN? AND WHAT APPROPRIATE SANCTIONS SHOULD ISSUE?

1 AT THIS POINT, MR. KRAMER, SIX4THREE AND THE LEGAL
2 TEAM ARE NOT ABLE TO TELL YOUR HONOR OR FACEBOOK WHO HAS
3 CONFIDENTIAL INFORMATION OR WHAT INFORMATION THEY HAVE. WE
4 LITERALLY DON'T KNOW WHAT INFORMATION IS OUT THERE. WE HAVE
5 250 PAGES FROM MR. GODKIN'S DECLARATION AND THE EXHIBITS THAT
6 WE KNOW ARE PUBLIC BECAUSE THEY WERE PUBLISHED BY THE U.K.
7 PARLIAMENTARY COMMITTEE THIS WEEK. AND THERE'S BEEN AMPLE
8 NEWS COVERAGE ABOUT THEM. WE KNOW ABOUT THOSE 250 PAGES.

9 BUT MR. KRAMER WHO PROVIDED THE DOCUMENTS CAN'T TELL
10 US WHAT ELSE IS OUT THERE? WHO ELSE MIGHT HAVE IT. AND
11 MR. SCARAMELLINO WHO PROVIDED THE DOCUMENTS TO MR. KRAMER IN
12 VIOLATION OF THE PROTECTIVE ORDER, WE HAVE NO IDEA WHAT HE WAS
13 SAYING TO THE DOZENS OF THIRD PARTIES THAT HE WAS TALKING TO
14 ABOUT THIS CASE. WHAT MEMBERS OF THE PRESS OR THE MEDIA HE
15 MIGHT HAVE BEEN TALKING TO. WHAT OTHER GOVERNMENT AGENCIES
16 THEY WERE TALKING TO.

17 THERE'S SO MANY OPEN QUESTIONS HERE. AND UNTIL WE
18 GET THE BASIC DISCOVERY TO UNDERSTAND WHAT HAS HAPPENED, ON
19 WHAT TIMELINE AND WHO WAS INVOLVED, WE WON'T KNOW WHAT THE
20 EXTENT OF THE VIOLATIONS WERE AND WHAT THE APPROPRIATE
21 REMEDIES AND SANCTIONS WOULD BE BEYOND WHAT WE THINK IS
22 APPROPRIATE WHICH IS LIKE A MINIMUM TERMINATING SANCTIONS.

23 THE COURT: THE LARGEST QUESTION FOR THE COURT IS
24 WHY WAS IT NECESSARY TO HAVE ALL THIS CONFIDENTIAL INFORMATION
25 DEDESIGNATED AS BEING CONFIDENTIAL? WHY? IF THAT INFORMATION
26 IS USED FOR THE PROSECUTION OF A PLAINTIFF'S CASE TO SEEK

1 RECOMPENSE FOR WHATEVER DAMAGES THAT PLAINTIFF HAD SUSTAINED
2 AS A RESULT OF THE ALLEGED CONDUCT OF FACEBOOK, IT WOULD SEEM
3 TO ME THAT SO LONG AS THAT INFORMATION WAS AVAILABLE TO
4 PROSECUTE THE CASE, IT DIDN'T NEED TO BE WITHIN THE PUBLIC
5 DOMAIN. AND THEY COULD ACCOMPLISH WHAT THEY COULD ACCOMPLISH.

6 MOTIONS TO SEAL ARE FREQUENTLY GRANTED BY COURTS.
7 PROTECTIVE ORDERS ARE ROUTINELY ISSUED BY COURTS. I SIGN THEM
8 ALMOST DAILY IN COMPLEX LITIGATIONS AND OTHERWISE. THIS IS
9 NOTHING NEW. AND THE CASES ARE PROSECUTED WITHIN THE AMBIT OF
10 THOSE PROTECTIVE ORDERS.

11 SO THE COURT IS CONCERNED AS TO HOW AND WHY THESE
12 DOCUMENTS WERE DISCLOSED. AND WHY THERE WAS SO MUCH EFFORT TO
13 HAVE THEM DISCLOSED BEYOND THE LAWSUIT IN THE FIRST PLACE.
14 THAT DOESN'T MAKE ANY SENSE TO THE COURT, IF ALL LAWSUITS
15 SUBJECT TO PROTECTIVE ORDERS ARE PROSECUTED WITHIN THOSE
16 PROTECTIVE ORDERS.

17 MS. MEHTA: YOUR HONOR, THAT'S EXACTLY OUR QUESTION.
18 AND THAT'S WHY WE REQUESTED THIS EXPEDITED DISCOVERY AND
19 PRESERVATION OF EVIDENCE. ESPECIALLY GIVEN THAT SINCE
20 THESE -- AT LEAST THE MOST RECENT OR THE FINAL STEP IN THIS
21 VIOLATION OF THE COURT'S ORDER HAS COME TO LIGHT, WE NEED TO
22 KNOW EXACTLY WHAT'S HAPPENED BECAUSE SINCE THAT POINT WE KNOW
23 EVIDENCE HAS BEEN DESTROYED OR DELETED. AND WE HAVE SWORN
24 STATEMENTS THAT THAT WAS DONE AT THE DIRECTION OF COUNSEL.

25 SO THE QUESTION IS HOW DO WE AND MOST IMPORTANTLY
26 THE COURT GET TO THE BOTTOM OF WHAT HAPPENED HERE AND WHEN IT

EXHIBIT 5

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**DEFENDANTS' CASE MANAGEMENT
STATEMENT**

Date: March 8, 2019
Time: 9:00 a.m.
Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

1 Defendants Facebook, Inc., Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin,
2 Michael Vernal, and Ilya Sukhar (collectively “Defendants”) submit the following Case Management
3 Statement in advance of the Case Management Conference set for March 8, 2019.

4 **I. CASE STATUS**

5 On November 21, 2018, Theodore Kramer, CEO and founder of Plaintiff Six4Three, LLC
6 (“Six4Three”) violated this Court’s protective order; the Court’s sealing order of November 1, 2018; and
7 the Court’s order of November 20, 2018 that Six4Three should not disclose any Facebook documents by
8 disclosing Confidential and Highly Confidential information to the Digital, Culture, Media, and Sport
9 (“DCMS”) Committee of the United Kingdom.

10 In December 2018, the DCMS Committee published several of the documents that Six4Three and
11 Mr. Kramer had disclosed to it, including documents that were designated as Confidential or Highly
12 Confidential under the protective order. On February 15, 2019, the day before the President’s Day long
13 weekend, Mr. Collins tweeted that the DCMS Committee would be releasing additional documents from
14 Six4Three and Mr. Kramer’s disclosure. (The Court will recall that Mr. Kramer had contacted Mr. Collins
15 last fall and invited him to order Mr. Kramer to produce the Facebook documents that Six4Three had
16 received in litigation.) On February 16, 2019, a Saturday, Mr. Godkin notified Facebook’s counsel that
17 “Damien Collins has announced on Twitter his intention to release additional Facebook documents,” and
18 passed the responsibility for preventing this further release of documents onto Facebook, even though it
19 was his client that had disclosed the documents and initiated the relationship with the DCMS Committee
20 in the first place. Because Six4Three and its legal team were responsible for the disclosure to the DCMS
21 Committee, Facebook’s counsel asked Mr. Godkin multiple times to “identify any steps taken by
22 Six4Three, [him], or the Six4Three legal team since November 19, 2018 to prevent disclosure or release
23 of the documents by DCMS, including steps that Six4Three, [he], or the Six4Three legal team have taken
24 to prevent the release referenced in the email below.” Mr. Godkin refused to do so, despite the fact that
25 Mr. Kramer had previously said, in an apparent attempt to gain sympathy from the Court, that he had
26 engaged an international law firm in Washington, D.C., to “undertake whatever efforts it can under British
27 law to either obtain the documents that were provided . . . or to . . . secure agreement that they will not be
28 released[.]” See Nov. 30, 2018 Hrg. Tr. at 57:2-7. The DCMS Committee subsequently published yet

1 more documents that Six4Three and Mr. Kramer had disclosed to it, all of which were designated as
2 Confidential under the protective order.¹ All of these documents were published online in their entirety.
3 *Id.* The DCMS Committee also released its final report on “Disinformation and ‘fake news,’” which relied
4 heavily on the Confidential and Highly Confidential documents that Six4Three and Mr. Kramer disclosed
5 to the DCMS Committee, and quoted and described those documents.² The report notes several times that
6 the documents were sealed in this Court, showing a complete disregard for the integrity of this judicial
7 system and the sanctity of its orders.³

8 At the same time, Six4Three was apparently readying a misleading and libelous fundraising plea,
9 which Six4Three published on February 19, 2019. The plea, posted to the publishing platform Medium
10 and linking users to a fundraising page at GoFundMe.com, falsely accused Facebook of intentionally
11 violating user privacy and engaging in “mafia-like tactics.” *How Facebook Sold Your Data and Fooled*
12 *Government Regulators (Until Now)* (Feb. 19, 2019), available at [https://medium.com/@six4three/how-](https://medium.com/@six4three/how-facebook-sold-your-data-and-fooled-government-regulators-until-now-b8b3d41fb565)
13 [facebook-sold-your-data-and-fooled-government-regulators-until-now-b8b3d41fb565](https://medium.com/@six4three/how-facebook-sold-your-data-and-fooled-government-regulators-until-now-b8b3d41fb565). The plea falsely
14 claims that, “[o]nce a company relied on [Facebook’s] APIs based on Facebook’s promises, Facebook then
15 effectively put a gun to its head and forced it to deliver data or money for ads.” *Id.* Six4Three then leveled
16 baseless accusations against Facebook regarding its litigation conduct: “They have put our families through
17 immense distress. We’ve been tracked, followed, intimidated, [and] harassed[.]” *Id.* Six4Three should not
18 be permitted to continue to avoid any scrutiny by this Court (and Facebook) as to its admitted misconduct
19 and violation of Court orders, while attempting to cloak its false, inflammatory public accusations as
20 somehow legitimate because Facebook produced discovery (which does not in fact support those
21 accusations) as part of the litigation process.

22 To this day, Six4Three and its legal team, including Thomas Scaramellino, Birnbaum & Godkin,
23 LLP (“Birnbaum & Godkin”), and Gross & Klein LLP (“Gross & Klein”) have not provided Facebook the
24

25 ¹ *Further selected documents ordered from Six4Three*, available at
26 [https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Further-selected-](https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Further-selected-documents-ordered-from-Six4Three-Feb19.pdf)
[documents-ordered-from-Six4Three-Feb19.pdf](https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Further-selected-documents-ordered-from-Six4Three-Feb19.pdf)

27 ² *Disinformation and ‘fake news’: Final Report* (Feb. 18, 2019), available at
28 <https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/179102.htm>

³ See, e.g., *id.* at 5, 20, 26, 27, 40.

information necessary for Facebook and the Court to understand the scope of Six4Three and its legal team's violations of the Court's orders and to remediate those violations. They have not even identified all entities to whom they disclosed Facebook's Confidential and Highly Confidential information, and so Facebook still does not know who has its Confidential and Highly Confidential information and what they intend to do with it. For instance, Facebook does not know if the DCMS Committee has now published all of the documents Six4Three and Mr. Kramer disclosed to it, or if it intends to publish additional documents containing Facebook's Confidential and Highly Confidential information in the future. Instead of cooperating with Facebook, Six4Three and its legal team have repeatedly obstructed Facebook's limited requests for discovery and repeatedly delayed the hearing on Facebook's motion to open limited discovery into Six4Three and its legal team's breaches of this Court's orders. Facebook's motion to open limited discovery was originally set for hearing on February 7, 2019, but has been delayed for more than a month. The hearing on that motion should proceed as planned on March 15, 2019. But if Six4Three requests a further continuance, then Facebook requests that the hearing occur at the Court's earliest convenience and no later than April 9, 2019.

As another example, Facebook—with the Court's leave—originally served deposition notices on shortened time on these issues on November 30, 2018. But Facebook still has not been able to depose any witness regarding the multiple violations of the Court's orders. Facebook thus respectfully requests that the Court promptly resolve the motions to withdraw and then set a schedule for limited discovery and a briefing schedule for motions for terminating sanctions and contempt as set forth in Section III.

II. PENDING MOTIONS

The following motions are currently pending before the Court:

Motion	Filed	Briefing Status	Original Hearing Date	Current Hearing Date
Birnbaum & Godkin LLP's Motion to be Relieved as Counsel	January 8, 2019	Fully briefed	February 7, 2019	March 13, 2019
Stuart Gross and Gross & Klein LLP's Motion to be Relieved as Counsel	January 8, 2019	Fully briefed	February 7, 2019	March 13, 2019
Defendant Facebook, Inc.'s Motion to Seal	January 17, 2019	Motion filed	February 7, 2019	March 13, 2019

Motion	Filed	Briefing Status	Original Hearing Date	Current Hearing Date
Defendant Facebook, Inc.'s Motion to Open Discovery and to Compel	January 8, 2019	Motion filed	February 7, 2019	March 15, 2019
Defendants Mark Zuckerberg, Christopher Cox, Javien Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar's Motion for Attorneys' Fees and Costs Pursuant to California Code of Civil Procedure Section 25.16(c)	September 14, 2018	Fully briefed	December 7, 2018	March 15, 2019
Six4Three's Motion for Attorneys' Fees and Costs in Opposing Facebook's Special Motion to Strike (Anti-SLAPP)	September 21, 2018	Motion and opposition filed	January 11, 2019	March 15, 2019
Defendant Facebook, Inc.'s Motion to Seal	January 8, 2019	Motion filed	February 7, 2019	TBD

III. PROPOSED SCHEDULE

Event	Date
Hearing on <ul style="list-style-type: none"> Birnbaum & Godkin LLP's Motion to be Relieved as Counsel Stuart Gross and Gross & Klein LLP's Motion to be Relieved as Counsel Defendant Facebook, Inc.'s Motion to Seal (filed Jan. 17, 2019) 	March 13, 2019
Hearing on Defendant Facebook, Inc.'s Motion to Open Discovery and to Compel	March 15, 2019
Deadline for Six4Three to retain counsel, if the Court grants the motions to withdraw	March 27, 2019
Hearing on <ul style="list-style-type: none"> Defendants Mark Zuckerberg, Christopher Cox, Javien Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar's Motion for Attorneys' Fees and Costs Pursuant to California Code of Civil Procedure Section 425.16(c) Six4Three's Motion for Attorneys' Fees and Costs in Opposing Facebook's Special Motion to Strike (Anti-SLAPP) Defendant Facebook, Inc.'s Motion to Seal (filed Jan. 8, 2019) 	At the Court's earliest convenience, following the hearing on Defendant Facebook, Inc.'s Motion to Open Discovery and to Compel

Event	Date
Deadline for Six4Three, Birnbaum & Godkin, Gross & Klein, and Scaramellino to complete production of documents responsive to Facebook's Nov. 30, 2018 document requests	April 16, 2019
Completion of depositions of Mr. Kramer, Mr. Scaramellino, Mr. Godkin, Mr. Kruzer, and Mr. Gross	April 30, 2019
Facebook files motions for terminating sanctions, contempt	May 7, 2019
Hearing on Facebook's motions for terminating sanctions, contempt	May 29, 2019, or at the Court's earliest convenience

Dated: February 21, 2019

DURIE TANGRI LLP

By: _____


CATHERINE Y. KIM

Attorney for Defendants
Facebook, Inc., Mark Zuckerberg, Christopher Cox,
Javier Olivan, Samuel Lessin, Michael Vernal, and
Ilva Sukhar

PROOF OF SERVICE

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On February 21, 2019, I served the following documents in the manner described below:

DEFENDANTS' CASE MANAGEMENT STATEMENT

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jposada@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

Stuart G. Gross
GROSS & KLEIN LLP
The Embarcadero, Pier 9, Suite 100
San Francisco, CA 94111
sgross@grosskleinlaw.com

David S. Godkin
James Kruzer
BIRNBAUM & GODKIN, LLP
280 Summer Street
Boston, MA 02210
godkin@birnbaumgodkin.com
kruzer@birnbaumgodkin.com

*Attorneys for Plaintiff
Six4Three, LLC*

Donald P. Sullivan
Wilson Elser
525 Market Street, 17th Floor
San Francisco, CA 94105
donald.sullivan@wilsonelser.com
Joyce.Vialpando@wilsonelser.com
Dea.Palumbo@wilsonelser.com

Attorney for Gross & Klein LLP

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

*Attorney for Theodore Kramer and Thomas
Scaramellino (individual capacities)*

Steven J. Bolotin
Morrison Mahoney LLP
250 Summer Street
Boston, MA 02210
sbolotin@morrisonmahoney.com
Llombard@morrisonmahoney.com

James A. Murphy
James A. Lassart
Thomas P Mazzucco
Joseph Leveroni
Murphy Pearson Bradley & Feeney
88 Kearny St, 10th Floor
San Francisco, CA 94108
JMurphy@MPBF.com
jlassart@mpbf.com
TMazzucco@MPBF.com
JLeveroni@MPBF.com

Attorney for Birnbaum & Godkin, LLP

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct. Executed on February 21, 2019, at San Francisco, California.

3
4 
5 Jennifer Posada
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 6

CIVIL NO. A154890/155334

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR**

SIX4THREE, LLC,

Respondent-Cross-Appellant,

vs.

FACEBOOK, INC.,

Appellant,

MARK ZUCKERBERG, CHRISTOPHER COX, JAVIER OLIVAN, SAMUEL LESSIN,
MICHAEL VERNAL, ILYA SUKHAR,

Cross-Respondents. /

On Appeal From San Mateo Superior Court, Case No. CIV533328
Honorable V. Raymond Swope

BRIEF OF CROSS-RESPONDENTS

PUBLIC – MATERIAL FROM SEALED RECORD REDACTED

MAYER BROWN LLP

DONALD FALK (SBN 150256)

Two Palo Alto Square, Suite 300

3000 El Camino Real

Palo Alto, California 94306-2112

Telephone: (650) 331-2000

Facsimile: (650) 331-2060

LAUREN GOLDMAN (*pro hac vice*)

KAREN LIN (*pro hac vice*)

MAYER BROWN LLP

1221 Avenue of the Americas

New York, New York 10020-1001

(212) 506-2500 Telephone

(212) 262-1910 Facsimile

*Attorneys for Appellant Facebook, Inc. and Cross-Respondents Mark
Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael
Vernal, and Ilya Sukhar.*

Document received by the CA 1st District Court of Appeal.

TABLE OF CONTENTS

INTRODUCTION	10
STATEMENT OF FACTS	11
A. Facebook’s Free Platform For Third-Party Application Developers	11
B. Facebook’s Statement of Rights and Responsibilities	12
C. Six4Three Develops An App To Locate Photos Of People In Bikini Bathing Suits	14
D. Facebook Announces That It Would Depublish The Photos And Content Of App Users’ Friends To Protect User Privacy	14
PROCEEDINGS BELOW	15
A. Six4Three Files This Action And Uses It As A Tool To Harass Facebook And The Individual Defendants.	15
B. Facebook’s Anti-SLAPP Motion and Six4Three’s Response	17
C. Six4Three Files Its Fifth Amended Complaint, Adding The Individual Defendants	18
D. The Individual Defendants File A Timely Anti-SLAPP Motion.	21
E. Six4Three’s Efforts To Funnel Facebook’s Confidential And Highly Confidential Documents To The Media.	22
F. The Superior Court Denies Facebook’s Anti-SLAPP Motion But Grants The Individual Defendants’ Motion.	24
G. Six4Three’s “Unconscionable” Conduct After The Ruling Under Appeal.	25
ARGUMENT	26
I. SIX4THREE DID NOT ESTABLISH THAT THE COMMERCIAL SPEECH EXCEPTION APPLIES TO ITS CLAIMS.	27
A. The Trial Court Properly Declined To Consider Arguments Not Made In Six4Three’s Memorandum of Points And Authorities.	27

1.	The Superior Court Did Not Abuse Its Discretion.	28
2.	Incorporation Of Six4Three’s Prior Briefs Would Have Resulted In A Substantially Oversized Brief.	30
3.	No Abuse Of Discretion Can Arise From The Speculation That Six4Three Might Have Obtained Leave To File An Oversized Brief—Leave It Never Sought.	32
4.	No “Policy” Requires Trial Courts To Overlook Flagrant Violations Of The Rules.	33
B.	Six4Three’s Other Briefs Did Not Establish That The Commercial-Speech Exemption Applies.	34
1.	Six4Three Failed To Establish That Facebook Is Primarily Engaged In The Business Of Selling Or Leasing Goods Or Services.	35
2.	Six4Three Did Not Satisfy The Other Elements Of Section 425.17(c).	37
II.	SIX4THREE DID NOT ESTABLISH A LIKELIHOOD OF PREVAILING ON ITS CLAIMS.	39
1.	The Communications Decency Act Bars Six4Three’s Claims.	39
2.	Six4Three Did Not Submit Admissible Evidence Showing A Probability Of Success In Proving The Elements Of Its Claims.	42
	CONCLUSION	51

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Barnes v. Yahoo, Inc.</i> (9th Cir. 2008) 570 F.3d 1096	41
<i>Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC</i> (2008) 162 Cal.App.4th 858	45
<i>Bradstreet v. Wong</i> (2008) 161 Cal.App.4th 1440	49
<i>Calence, LLC v. Dimension Data Holdings, PLC</i> (9th Cir. 2007) 222 F. App'x 563	31
<i>Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co.</i> (1999) 20 Cal.4th 163	48
<i>Chavez v. Whirlpool Corp.</i> (2001) 93 Cal.App.4th 363	50
<i>City of Hope National Medical Center v. Genentech, Inc.</i> (2008) 43 Cal.4th 375	46
<i>Cohen v. Facebook, Inc.</i> (E.D.N.Y. 2017) 252 F.Supp.3d 140	42
<i>Cross v. Facebook, Inc.</i> (2017) 14 Cal.App.5th 190	35, 41
<i>Dean v. Friends of Pine Meadow</i> (2018) 21 Cal.App.5th 91	34, 36
<i>Demetriades v. Yelp, Inc.</i> (2014) 228 Cal.App.4th 294	36, 38, 42
<i>Doe II v. MySpace Inc.</i> (2009) 175 Cal.App.4th 561	40
<i>Energetiq Tech., Inc. v. ASML Netherlands B.V.</i> (D. Mass. July 10, 2015) 113 F.Supp.3d 461	31

<i>Evans v Unkow</i> (1995) 38 Cal.App.4th 1490	39
<i>Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC</i> (9th Cir. 2008) 521 F.3d 1157	41
<i>FDIC v. Dintino</i> (2008) 167 Cal.App.4th 333	27, 40
<i>Fremont Reorganizing Corp. v. Gaigin</i> (2011) 198 Cal.App.4th 1153	35
<i>Gaines-Tabb v. ICI Explosives, USA, Inc.</i> (10th Cir. 1998) 160 F.3d 613	31
<i>Garcia v. Superior Court</i> (1990) 50 Cal.3d 728	44
<i>Garrett v. Rosenthal</i> (2006) 40 Cal.4th 33	42
<i>Garrick Dev. Co. v. Hayward Unified Sch. Dist.</i> (1992) 3 Cal.App.4th 320	30
<i>Gregory v. Albertson's, Inc.</i> (2002) 104 Cal.App.4th 845	48
<i>Hassell v. Bird</i> (2018) 5 Cal.5th 522	40, 41
<i>Hawran v. Hixson</i> (2012) 209 Cal.App.4th 256	39
<i>Keyes v. Bowen</i> (2010) 189 Cal.App.4th 647	30
<i>Landry v. Berryessa Union Sch. Dist.</i> (1995) 39 Cal.App.4th 691	28, 34, 48
<i>Larsen v. Johannes</i> (1970) 7 Cal.App.3d 491	29
<i>Leek v. Cooper</i> (2011) 194 Cal.App.4th 399	45

<i>Lennar Homes of Cal., Inc. v. Stephens</i> (2014) 232 Cal.App.4th 674	26
<i>Los Angeles Mem. Coliseum Commission v. Insomniac, Inc.</i> (2015) 233 Cal.App.4th 803	45
<i>Mackey v. Board of Trustees of California State University</i> (2019) 31 Cal.App.5th 640, 657	32
<i>Marketing West, Inc. v. Sanyo Fisher (USA) Corp.</i> (1992) 6 Cal.App.4th 603	45
<i>In re Marriage of Green</i> (1989) 213 Cal.App.3d 14	33
<i>Masimo Corp. v. Philips Elec N. Am. Corp.</i> (D. Del. 2014) 62 F.Supp.3d 368.....	32
<i>Mercury Interactive Corp. v. Klein</i> (2007) 158 Cal.App.4th 60	28
<i>Monster Energy Co. v. Schechter</i> (2018) 26 Cal.App.5th 54	35
<i>Morrison v. Viacom, Inc</i> (1998) 66 Cal.App.4th 534	48, 49
<i>Navarro v. IHOP Properties, Inc.</i> (2005) 134 Cal.App.4th 834	38
<i>Navellier v. Sletten</i> (2002) 29 Cal.4th 82	39
<i>New.Net, Inc. v. Lavasoft</i> (C.D. Cal. 2004) 356 F.Supp.2d 1090	36, 37
<i>Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism</i> (2018) 4 Cal.5th 637	24
<i>Ochoa v. PG&E</i> (1998) 61 Cal.App.4th 1480	28
<i>People's Choice Wireless, Inc. v. Verizon Wireless</i> (2005) 131 Cal.App.4th 656	50

<i>Perlas v. GMAC Mortgage, LLC</i> (2010) 187 Cal.App.4th 429	44
<i>Quelimane Co. v. Steward Title Guar. Co.</i> (1998) 19 Cal.4th 26	47
<i>Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker</i> (2016) 2 Cal.App.5th 252	32
<i>Reeves v. Hanlon</i> (2004) 33 Cal.4th 1140	47
<i>Rep. of Kazakhstan v. Ketebaev</i> (N.D. Cal. June 8, 2018) 2018 WL 2763308	31
<i>Rivera v. First DataBank, Inc.</i> (2010) 187 Cal.App.4th 709	34, 37, 38
<i>Robbins v. Alibrandi</i> (2005) 127 Cal.App.4th 438	28
<i>Roth v. Plikaytis</i> (2017) 15 Cal.App.5th 283	29
<i>Saville v. Sierra College</i> (2005) 133 Cal.App.4th 857	35
<i>Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.</i> (N.D. Cal. 2015) 144 F.Supp.3d 1088	41, 42
<i>Simpson Strong-Tie Co. v. Gore</i> (2010) 49 Cal.4th 12	26, 27, 34, 39
<i>Soukup v. Law Offices of Herbert Hafif</i> (2006) 39 Cal.4th 260	30
<i>St. Mary v. Superior Court</i> (2014) 223 Cal.App.4th 762	35
<i>Tarmann v. State Farm Mut. Auto. Ins. Co.</i> (1991) 2 Cal.App.4th 153	43
<i>UAS Mgmt., Inc. v. Mater Misericordiae Hospital</i> (2008) 169 Cal.App.4th 357	49

<i>United States Liab. Ins. Co. v. Haidinger-Hayers, Inc.</i> (1970) 1 Cal.3d 586	49
<i>Vergos v. McNeal</i> (2007) 146 Cal.App.4th 1387	39
<i>Weitz v. Yankosky</i> (1966) 63 Cal.2d 849	34
<i>Worldvision Enterprises, Inc. v. Am. Broadcasting Cos.</i> (1983) 142 Cal.App.3d 589	46
<i>Yu v. Signet Bank/Virginia</i> (2014) 103 Cal.App.4th 298	17
Statutes	
42 U.S.C. § 230.	39, 40
Code. Civ. Proc. § 425.16(b)(2)	37, 38
Code Civ. Proc. § 425.17(c)	27, 28, 35, 37, 38, 39
Code Civ. Proc. § 437c(b)(7)	30
Other Authorities	
Cal. Rules of Court, rule 3.1110.....	28, 29
Cal. Rules of Court, rule 3.1113.....	24, 29, 30, 32, 33
Cal Rules of Court, rule 3.1300.....	32
Cal. Rules of Court, rule 8.204.....	30
Deepa Seethaman & Elizabeth Swoskin, Facebook’s Restrictions on User Data Cast a Long Shadow, Wall St. J., Sept. 21, 2015	14
f82014: Stability for Developers & More Control for People, Facebook newsroom, Apr. 30, 2014, https://newsroom.fb.com/news/2014/04/f82014--stability- for-developers-and-more-control-for-people-in-apps/	14

Josh Constine, Facebook Themes f8 Around a “Stable Mobile Platform,” Offers 2-Year API Stability Guarantee, TechCrunch, Apr. 30, 2014, https://techcrunch.com/2014/04/30/facebook-api-guarantee/	15
Kelsey Sutton, <i>Internal Emails Shine Light on Facebook’s Approach to Sharing and Selling Data With Developers</i> , Adweek, Dec. 5, 2018, https://www.adweek.com/digital/internal-emails-shine-light-on-facebooks-approach-to-sharing-and-selling-data-with-developers/	25
<i>Response to Six4Three Documents</i> , Facebook newsroom, Dec. 5, 2018, https://newsroom.fb.com/news/2018/12/response-to-six4three-documents/	25-26

INTRODUCTION

Six4Three's theories, claims, and arguments have shifted endlessly, but its strategy has remained consistent: To extract a settlement from Facebook and several current and former executives (the "Individual Defendants") by using insubstantial claims as a vehicle for harassment. On their face, these claims are designed to impose liability on Facebook for protecting its users' privacy by limiting who can see and use their photos and other information. Six4Three has avoided litigating the merits of its claims, instead using the litigation process to generate media attention, publicize spurious misconduct allegations, and leak Facebook's confidential documents that were produced under seal, in violation of multiple court orders. Indeed, in ongoing proceedings below Six4Three now faces contempt charges and additional sanctions for repeatedly leaking Facebook's confidential material.

This strategy of sidestepping substance in favor of media-oriented mudslinging is precisely what triggered the order challenged in this appeal. Instead of responding to the Individual Defendants' arguments, Six4Three submitted a filing that incorporated four entire briefs by reference. It did so to free up space for nearly 15 pages of new, irrelevant and baseless factual allegations designed to drum up media interest in the case. Six4Three also attached as exhibits thousands of pages of Facebook's Confidential and Highly Confidential documents. Six4Three then funneled those documents to media outlets, in violation of numerous court orders.

Six4Three now maintains that the Superior Court's finding of waiver was an abuse of discretion—that the court was compelled to sift through the briefs improperly incorporated by reference, as well as the thousands of pages of exhibits, to find any arguments or evidence that might have some bearing on the Individual Defendants' motion. Six4Three's arguments are meritless.

First, Six4Three does not dispute that Section 425.16 of the anti-SLAPP law applies on its face. Accordingly, Six4Three had the burden of adducing admissible evidence demonstrating that either (1) the statute's commercial-speech exemption applied, or (2) there was a reasonable probability that Six4Three would prevail on its claims. The Superior Court acted well within its discretion in finding that Six4Three failed to make either showing because it made *no argument* in the body of its memorandum. Litigants are charged with the duty to set forth their positions clearly and concisely; Six4Three identifies no authority permitting it instead to send the court and adversary on a hunt through previously filed documents to figure out its argument. Nor does Six4Three identify any authority allowing a party to circumvent page limits by incorporating by reference dozens of additional pages of briefing.

Second, Six4Three's improperly incorporated arguments would not change the result in any event. Division Two of this District has already held that the commercial-speech exemption does not apply to speech about Facebook's free services, and Six4Three offered no evidence that would permit the trial court to find otherwise. And Six4Three failed to offer admissible evidence supporting a probability of success on its claims, either in its opposition to the Individual Defendants' motion *or* in the opposition to Facebook's anti-SLAPP motion that Six4Three tried to incorporate by reference.

Six4Three's claims and purported evidence against the Individual Defendants have been weighed in the balance and found wanting. The order striking those claims should be affirmed.

STATEMENT OF FACTS

A. Facebook's Free Platform For Third-Party Application Developers

Facebook is a free social networking service that enables users to

connect and share information with their family and friends. (CAA001208¹; AA1086.) A Facebook user's "friends" are the people who have chosen to connect with that user on Facebook. In 2007, Facebook launched the Platform, a set of free services and application program interfaces ("APIs") that Facebook provides to software developers so that they can build applications that integrate with Facebook's social graph and enhance users' social experiences. (CAA001208, 001211-14, 000865; AA1086, 1089-92, 0744.) An API enables an application to communicate (and thus interact) with another application.

Facebook's "Graph" consists of data about Facebook users and their relationships with one another and pieces of content published on the site. In April 2010, Facebook launched Graph API, a tool that standardizes the Graph data that Facebook makes available to developers through the Platform, making it easier to integrate applications with Facebook. (CAA 001222-23; AA1100-01.) Graph API initially permitted developers to read and use not only the content posted by the users who downloaded their applications, but *also* the content that those users' friends had shared with them on Facebook, if those friends had consented to such sharing in their Facebook privacy settings. (*Ibid.*)

B. Facebook's Statement of Rights and Responsibilities

Before a developer can build any application that integrates with Facebook, it must agree to Facebook's Terms of Service, previously known as the Statement of Rights and Responsibilities ("SRR"). (CRA0008; AA0310, 0433; *see also* CAA001232, 000550; AA0034.)

¹ Citations to "CAA" and "SCAA" refer to Cross-Appellant Six4Three's Appendix and Sealed Appendix, respectively. Citations to "CRA" refer to Cross-Respondents' Appendix. Citations to "CAOB" refer to Cross-Appellant's opening brief. Citations to "AA" and "SAA" refer to Appellant Facebook's Appendix and Sealed Appendix, respectively, filed in Appeal No. A154890, which is consolidated with this appeal.

The December 2012 SRR—the version in place when Six4Three signed up for Facebook, and the version invoked in the complaint—expressly *disclaimed* any commitment to provide developers with permanent, unfettered access to Facebook content and data:

Your access to and use of data you receive from Facebook, will be limited as follows:

...

9. We can limit your access to data.

(CAA000558 (“December 2012 SRR”); AA0441.) “Data” was defined as “any data, including a user’s content or information[,] that you or third parties can retrieve from Facebook or provide to Facebook through Platform.” (CAA000562; AA0445.) The SRR further stated that Facebook “give[s] you all rights necessary to use the code, APIs, data, and tools you receive from us,” but “do[es] not guarantee that Platform will always be free.” (CAA000558; AA0441.) The “all rights” language was eliminated from the SRR by January 30, 2015.²

The SRR directed users and developers to “review the following documents, which provide additional information about your use of Facebook.” (CAA000563; AA0446.) Those documents, which were linked directly from the SRR, included the “Platform Page.” (*Ibid.*) At all relevant times, the Platform Page has explained that Facebook will provide 90 days’ notice of Platform changes that may cause developers’ applications to break (*i.e.*, stop working as intended). (CRA0078; AA0040.)

² Facebook’s terms expressly permit it to amend the SRR and state that a developer’s “continued use of Facebook following changes to our terms constitutes [its] acceptance of our amended terms.” (CAA000554, 000560; AA0437, 0443.) The SRR also provides that “[t]his Statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreements.” (CAA000562; AA0445.)

C. Six4Three Develops An App To Locate Photos Of People In Bikini Bathing Suits

In December 2012, five years after Facebook launched the Platform, Six4Three was founded and agreed to Facebook's SRR on December 11, 2012. (CAA001232; AA 1110.) Six4Three has developed only one app: Pikinis, which enables users to search through photos for images of people wearing bathing suits and to bookmark those photos for later use. Pikinis worked by using Facebook's Platform, including the Graph API, to search not only the photos uploaded by the user who downloaded the app, but also the photos shared with that user by his or her Facebook *friends* whose settings permitted such access. (CAA001231, 001237; AA1109-10, 1115.) Pikinis never generated materially more than \$400 in sales.³ (CRA00082.)

D. Facebook Announces That It Would Depublish The Photos And Content Of App Users' Friends To Protect User Privacy

As more and more applications began to use the Facebook Platform, Facebook received feedback indicating that users wanted more control over whether their personal information would be shared with third-party developers and their apps, and that they were often surprised when a friend shared their information with an app. (See, *e.g.*, CAA001247; AA1125.)⁴

To address this feedback, on April 30, 2014, Facebook publicly announced various changes to the Platform and Graph API. As relevant here,

³ As noted below at pp.16-17, the Superior Court sanctioned Six4Three for its discovery abuse and prohibited it from offering evidence of any other earnings.

⁴ See also Deepa Seethaman & Elizabeth Swoskin, Facebook's Restrictions on User Data Cast a Long Shadow, Wall St. J., Sept. 21, 2015 (cited at CAA001256-57; AA1134-35); f82014: Stability for Developers & More Control for People, Facebook newsroom, Apr. 30, 2014, <https://newsroom.fb.com/news/2014/04/f8-2014-stability-for-developers-and-more-control-for-people-in-apps/> [as of Apr. 16, 2019].

Facebook told app developers that they would no longer be able to view and use photos and other content shared by friends of the users who downloaded the developers' apps (as opposed to the photos and content posted by those users themselves). Facebook announced that these changes would take effect in one year. (CAA001246; AA1124.)⁵ Six4Three alleges that it received an email from Facebook providing notice of these changes on January 20, 2015. (CAA001253; AA1131.)

In July or August 2014, *after* Facebook's announcement, Six4Three allegedly entered into a handful of license agreements and subscriptions with users of its bikini-finding app. (CAA001286,1553; AA1164.)

On or about April 30, 2015, Facebook depublished friend content from the Platform. (CAA001255; AA1133.)

PROCEEDINGS BELOW

A. Six4Three Files This Action And Uses It As A Tool To Harass Facebook And The Individual Defendants.

On April 10, 2015, Six4Three filed a ten-page complaint against Facebook and 50 "John Doe" defendants in San Mateo Superior Court, alleging that Facebook's decision to depublish photos of users' friends made it "impossible for [Six4Three] to continue to operate the [Pikinis] App, to abide by the license agreements and purchase terms entered into by [Six4Three] with its users, and ... to recoup any of its investment of capital, human, labor, time, effort, and energy." (CAA00031; AA0026.) Among other relief, Six4Three sought damages and a permanent injunction prohibiting Facebook from removing developers' access to their users' friends' photos.

⁵ See also Josh Constine, Facebook Themes f8 Around a "Stable Mobile Platform," Offers 2-Year API Stability Guarantee, TechCrunch, Apr. 30, 2014, <https://techcrunch.com/2014/04/30/facebook-api-guarantee/> (cited at CAA001249; AA1127).

Over the next few years, Six4Three avoided litigating its claims on the merits. It materially amended its complaint twice, then tried to inject federal law claims into the litigation during discovery. Yet after Facebook removed the case to federal court, Six4Three walked back its assertions about federal issues, leading the federal judge to describe Six4Three's tactical approach as "gamesmanship." (Doc. 35 at 4, No. 3:17-cv-00359 (N.D. Cal. Feb. 14, 2017).)

Upon remand, almost two years after filing its original complaint, Six4Three moved to amend its complaint for a *third* time to add six current and former executives of Facebook as individual defendants: CEO Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar. (CAA129-30, AA0169-70.) Six4Three added these defendants for the express purpose of circumventing the trial court's order finding that Six4Three had failed to meet its burden of showing that it was entitled to discovery from these individuals; Six4Three figured that if it couldn't depose the individuals as witnesses, it would be able to do so if they were parties to the suit. (CAA001540.) The proposed third amended complaint also added over 30 pages of allegations and four new claims. (CAA000132-200, 005499; AA0172-240, 1683). The Superior Court granted Six4Three leave to add the new causes of action, but denied leave to add the Individual Defendants (CAA000285; AA0246), and the Third Amended Complaint was filed in July 2017. (CAA005480; AA1664.)

Six4Three also used improper discovery tactics to frustrate litigation of its claims. While Six4Three's motion for leave was pending, Facebook obtained an order compelling Six4Three to produce its historical sales data. But Six4Three then informed Facebook that it had permitted that data to be deleted after filing this action. (CRA00081; AA0242-43.) After Facebook moved for sanctions, Six4Three reversed course and represented that no sales data was ever lost or deleted; but Six4Three produced data for only three of

the nine months that the Pikinis app had been live. (CRA00081; AA0243.) The Superior Court ultimately imposed sanctions limiting Six4Three's evidence of actual sales of the Pikinis app to 276 units, for a total of \$412 in revenue. (CRA00082; AA0244.)

B. Facebook's Anti-SLAPP Motion and Six4Three's Response

Six4Three petitioned for a writ from this Court to permit it to add the Individual Defendants. (A152116 (pet. filed Aug. 11, 2017).) Meanwhile, Six4Three filed its *Fourth* Amended Complaint, weighing in at nearly 100 pages. (CAA000397; AA0279.) Twenty days later, *after obtaining leave of court*, Facebook filed a special motion to strike and for attorneys' fees and costs under the anti-SLAPP statute, along with another demurrer. (CAA000511, AA0394; see also CAA000501, 000506-07, AA0383, 0387-88.) Facebook's anti-SLAPP motion was timely under then-controlling precedent. (*E.g.*, *Yu v. Signet Bank/Virginia* (2014) 103 Cal.App.4th 298, 315.)

Six4Three's response to Facebook's motion did not cite any admissible evidence, as was required to satisfy its burden of showing a probability of success on its claims. (CAA000630; SCAA000011; SAA007.) More than two weeks *after* the deadline for its response, however, Six4Three filed a 700-page "supplemental declaration" from its counsel, Mr. Godkin, with exhibits. (SCAA000180-885; SAA0175-0886.)

At a hearing on Facebook's motion, the Superior Court explained the myriad problems with Six4Three's opposition. First, it noted that Six4Three's response cited prior briefs and its counsel's letters as "evidence," but those "documents ... aren't evidence," and warned that "this referencing something that references the evidence is not the way to go." (1RT38.) Second, the court identified the "problem" that Six4Three's response did not include a single reference the later-filed "700-page

supplemental declaration.” The declaration therefore was “floating in free space.” (*Ibid.*) The court noted that it expected to be able to review the opposition to a motion “substantively and not have everything be in pieces like this.” (*Ibid.*) Finally, the court admonished plaintiffs for “overus[ing] footnotes in order to get around page length limitations.” (*Id.* at 38-39.)

Despite Six4Three’s clear failure to carry its burden in opposition to Facebook’s motion, the Superior Court gave plaintiff a do-over. It continued the hearing on the anti-SLAPP motion, ordered supplemental briefing on the commercial-speech exemption, an argument that Six4Three had not raised, and directed Six4Three to “fix” the evidentiary problems the court had identified by submitting actual evidence to support their claims. (*Id.* at 39.) In the meantime, the court sustained Facebook’s demurrer without leave to amend as to the claims for intentional and negligent interference with prospective economic relations, and limited the damages available on the contract claim. (CAA000364-67; AA0248-51.)

C. Six4Three Files Its Fifth Amended Complaint, Adding The Individual Defendants

This Court issued a writ permitting Six4Three to amend its complaint again to add the Individual Defendants. (Order, A152116 (Dec. 4, 2017).) Six4Three then filed the Fifth Amended Complaint.

That complaint asserted eight claims, all premised on the same theory: that defendants’ decision to depublish friends’ photos and other content from the Platform was tortious and breached the SRR.

UCL. Six4Three alleged that Facebook and the Individual Defendants violated the UCL by launching the Platform and Graph API, which induced Six4Three and other developers to build apps for use on Facebook at no charge, and by stating that the Platform offered developers the opportunity to create and monetize apps. Defendants allegedly harmed Six4Three years later by limiting the ability of developers to see and use the

photos and other content posted by friends of app users, while “oligopoliz[ing]” for Facebook and unnamed “large companies” the ability to use this content. (CAA001259-61; AA1137-39.)

Breach of Contract. Six4Three claimed that the statement in the December 2012 SRR that Facebook would provide “all rights necessary to use the code, APIs, data, and tools you receive from us” was a promise to provide perpetual, unlimited access to all of Facebook’s code, APIs, data (including user data), and tools, and that Facebook breached that promise in 2015 by depublishing friend data from the Platform. (CAA001261-63; AA1139-41.)

Concealment. Six4Three alleged that in 2012, Facebook made the decision (implemented in 2015) to remove Graph API data from the view of developers unless those developers paid Facebook and did not directly compete with it, and that defendants had a duty to disclose that decision immediately both under the SRR and as a result of various “partial disclosures” that Facebook and its employees had made about the Platform. (CAA001263-78; AA1141-56.)⁶

Six4Three also alleged that Facebook made unspecified “partial disclosures” about various projects that allegedly violated user privacy. But the complaint did not identify any specific statements by Facebook or allege that Six4Three was injured by them; they were apparently included to generate media interest in the case. (CAA001271-76; AA1149-54.)

Intentional and Negligent Misrepresentation. Six4Three’s

6 These allegedly “partial disclosures” included 2012 and 2013 statements that (1) described alleged Reciprocity and Size Policies that permitted Facebook to restrict developers’ access to Graph API data; (2) described successful apps on Facebook and expressed Facebook’s aspiration of helping developers build apps; and (3) trained developers to build applications. (CAA001240-46, 001264-70; AA1118-24, 1142-48.)

misrepresentation claims rested on three sets of alleged statements:

- In 2007, Mr. Zuckerberg and Facebook described the Platform as a “big opportunity” for developers to build and monetize “applications that have the same access to integration into the social graph as Facebook applications” (CAA001208-14, 001219-20; AA1086-92, 1097-98);
- In 2010, Facebook explained that the upcoming launch of Graph API would enable developers to search public updates on Facebook and would eliminate the need for them to download a new software development kit whenever Facebook launched a new feature (CAA001223; AA1101); and
- In 2011, Mr. Zuckerberg said that Facebook was working to allow developers to connect to “anything you want in any way you want” (CAA001226; AA1104).

Six4Three claimed that through these statements Facebook represented that it would forever provide whatever user data and tools Six4Three desired, for free and on the same terms as other developers and Facebook itself, and that Facebook would “support” Six4Three in building, distributing, and monetizing its application. (CAA001278-79, 1283; AA1156-57, 1161.) The complaint alleged that the representations were false because Mr. Zuckerberg later decided in 2012 to preclude app developers, including Six4Three, from reading and using certain data (although Facebook did not restrict that access until 2015). (CAA001281, 1283; AA1159, 1161.)

Intentional Interference With Contract. Six4Three alleged that, by restricting the dissemination of photos and other content posted by app users’ friends, Facebook and the Individual Defendants knowingly disrupted Six4Three’s handful of license agreements and subscriptions with users (which did not exist until July or August 2014—*i.e.*, after Facebook announced its decision). (CAA01286, 1553; AA1164.)

Intentional and Negligent Interference With Prospective Economic Relations. Six4Three asserted the same tortious interference claims against

the Individual Defendants based on the same allegations that the court had found insufficient to survive Facebook's demurrer. Six4Three alleged that approximately 6,000 people signed up to be notified of Pikinis' launch. Six4Three also asserted that it had a reasonable expectation of prospective economic relations with "tens of thousands" of other unidentified Facebook users, and that Facebook interfered with those relationships by depublishing friend content from the Platform. (CAA001287-96; AA11165-74.)

Although Pikinis had generated only \$412 in sales, Six4Three claimed that the value of its outstanding shares exceeded \$4 million in 2015, and alleged lost profits of nearly *\$100 million*. (CRA00082, CAA01255; AA0163-64, AA1133.)

D. The Individual Defendants File A Timely Anti-SLAPP Motion.

The newly-added Individual Defendants responded to the Fifth Amended Complaint with their own anti-SLAPP motion. (CAA1504; AA1644.)

Six4Three offered no substantive legal response to the motion. Its memorandum in opposition included no statement of facts and cited just four cases (three in the same footnote). (See CAA004852.) The legal argument consisted of a single sentence that purported to "incorporate[] the arguments" raised in the four briefs that Six4Three had filed months earlier in opposition to Facebook's anti-SLAPP motion, and a handful of sentences each making conclusory assertions that Six4Three had met its burden of prevailing on its UCL, breach of contract, fraud, and tort claims. (CAA004840, 4852-54.) Six4Three took this approach even though the Superior Court had again warned in the interim that briefs are "not admissible evidence, and any facts stated therein are not admissible by mere incorporation by reference." (CRA00086.)

Six4Three filled the remaining 14.5 pages with specious and

unfounded accusations untethered to the anti-SLAPP motion or the causes of action in its complaint. For example, Six4Three asserted that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. (SCAA004934-45.)

Even though it had foregone any substantive response to the Individual Defendants' motion, Six4Three still had difficulty shoehorning all of this irrelevant material into 15 pages. Accordingly, it included dozens of long string citations without pin cites or descriptions of the documents cited, and relegated those citations to footnotes to skirt the double-spacing requirement. Significantly, the response also evaded page limits by citing a 70-page declaration by Mr. Godkin, Six4Three's counsel, in which he improperly purported to testify and opine about thousands of pages of internal Facebook documents—essentially 70 additional pages of briefing atop a jurat. And it further cited to a second 19-page declaration by Mr. Godkin requesting judicial notice of several thousand additional pages of documents.

E. Six4Three's Efforts To Funnel Facebook's Confidential And Highly Confidential Documents To The Media.

Six4Three's reason for responding to the anti-SLAPP motion the way it did soon became apparent: its audience was the media, not the Superior Court. Six4Three had been in steady communication with news outlets in an effort to generate adverse publicity about Facebook. Mr. Godkin's declaration was designed to call attention to and misrepresent the contents of thousands of pages of internal Facebook documents that were designated either "Confidential" or "Highly Confidential." The protective order in the case prohibited the parties from disclosing any of those documents to anyone other than limited categories of individuals involved in the case.

(CAA000113-14; AA0117-18.) And the documents cited were cherrypicked to create the false impression that Facebook sold data to developers or required developers to purchase advertising in exchange for data, even though every Facebook witness that Six4Three deposed in the case testified in no uncertain terms that Facebook never did any such thing.

Facebook moved to seal portions of Six4Three's opposition, Mr. Godkin's unfounded and improper declarations, and the reams of protected material in the attached exhibits. (CAA005022-41.) Six4Three opposed that motion and enlisted various media outlets to support its bid to unseal Facebook's documents. Several media organizations filed amicus briefs in support of Six4Three's opposition, as well as their own motions to unseal. (CAA005449-51; AA1635-1637.)⁷

In addressing Facebook's motion to seal, the court *sua sponte* struck many of the documents as irrelevant to the anti-SLAPP motion or mischaracterized by Six4Three's counsel, and sealed most of the remaining documents. (CRA000118-19, 122-128; AA1724-25, 1728-34.) The court again reprimanded Six4Three for attempting to incorporate its prior briefs as evidence:

Six4Three's prior briefs are not evidence. The Court previously admonished Six4Three for this practice in relation to Six4Three proffering briefs as evidence in opposing Facebook's Motion for Summary Adjudication. "This is not procedurally proper and 'evidence' cannot be incorporated by reference."

(CRA000122-23; AA1728-29.)

⁷ In a later order addressing Six4Three's mishandling of confidential information, the Superior Court found that those media communications about the motion to unseal, conducted by and with the aid of Six4Three's trial counsel, disclosed confidential information in violation of the Protective Order, and justify application of the crime-fraud exception to some of Six4Three's attorney-client communications. (CRA000214-22.)

F. The Superior Court Denies Facebook's Anti-SLAPP Motion But Grants The Individual Defendants' Motion.

In July 2018, the Superior Court, despite having granted Facebook leave to file its anti-SLAPP motion, nonetheless denied that motion as untimely based on its interpretation of an intervening California Supreme Court decision that changed the law governing the timeliness of anti-SLAPP motions. (CAA005352-57; AA1543-48; see *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637.) That part of the order is the subject of the consolidated appeal, A154890.

The court, however, granted the Individual Defendants' indisputably timely motion, finding that they had shown that Six4Three's claims arose from their exercise of free speech in connection with an issue of public interest: the "editorial decision . . . to de-publish certain categories of user-created content, including friends' photos and other content by means of its API." (CAA005359; AA1550 [quotation marks omitted].) The court noted that Six4Three had not offered any contrary argument or cited any evidence to oppose the motion. Instead, Six4Three only purported to incorporate arguments and citations to evidence made in a number of briefs that it had identified in a footnote. (CAA005360; AA1551.) The court further noted that Six4Three had provided no legal authority to support incorporation of arguments raised in other motions. (CAA005360; AA1551.) And it explained that incorporating those other filings would bring Six4Three's opposition to over 50 pages, well above the 15-page limit. (CAA005361 [citing Cal. Rules of Court, rule 3.1113(d)]; AA1552.) Because Six4Three did not seek leave to file an oversized memorandum, the court exercised its discretion in refusing to consider the incorporated briefing in ruling on the motion. (CAA005361-62; AA1552-53.)

Based on this analysis, the court held that Six4Three had failed to rebut Facebook's showing that Six4Three's claims arise from protected

activity, and failed to address the commercial-speech exemption of the anti-SLAPP statute. (CAA005362; AA1553.) It further held that Six4Three failed to satisfy its burden of demonstrating a probability of prevailing on the merits. (CAA005362; AA1553.) Six4Three failed to address the “argument that [Facebook] is immune from these causes of action pursuant to the Communications Decency Act,” and therefore waived that issue as well. (CAA005362-64; AA1553-55.)

G. Six4Three’s “Unconscionable” Conduct After The Ruling Under Appeal.

Having failed in its bid to publicize Facebook’s confidential materials by attaching them to its oppositions to the anti-SLAPP motions, Six4Three engaged in what the Superior Court described as “unconscionable” and “shock[ing]” conduct⁸: Six4Three released the documents through other avenues. As detailed in Facebook’s opening brief in A154890, a founder and managing director of Six4Three disclosed Facebook’s Confidential and Highly Confidential documents to government officials in the United Kingdom. (See CRA000165-74, 194-202, 214-22; AA1772-73.) The mere possession of Highly Confidential documents by a Six4Three officer and director violated the Protective Order. (CAA000114; AA0118.) And the disclosure to the government officials flouted multiple court orders, including a specific order of the Superior Court. (CRA131; AA1737.)⁹

⁸ Facebook has moved for judicial notice of the transcript of the November 30, 2018 hearing at which the court made these statements. The Individual Defendants have made a similar motion.

⁹ The foreign government officials promptly shared the documents with the press. (See Kelsey Sutton, *Internal Emails Shine Light on Facebook’s Approach to Sharing and Selling Data With Developers*, Adweek, Dec. 5, 2018, <https://www.adweek.com/digital/internal-emails-shine-light-on-facebooks-approach-to-sharing-and-selling-data-with-developers/> [as of Jan. 30, 2019]; *Response to Six4Three Documents*, Facebook newsroom, Dec. 5,

Denouncing Six4Three's conduct as "unconscionable" and "shocking," the Superior Court ordered discovery into the circumstances of Six4Three's misconduct. (CRA000184). Undeterred, Six4Three continued to violate the court's orders. (CRA000200-02.) The Superior Court has since found that Six4Three's attorney-client privilege was waived pursuant to the crime-fraud exception. (CRA000222.) The sanctions proceedings are ongoing.

ARGUMENT

Six4Three chose to forgo a substantive opposition to the Individual Defendants' motion in favor of a screed full of sensational but irrelevant allegations designed to generate negative publicity about Facebook. This tactic continued the very conduct that underlay Defendants' special motion to strike: the use of this litigation not to advance serious claims, but to harass Defendants for exercising their First Amendment rights.

This Court reviews a trial court's grant of an anti-SLAPP motion *de novo*. (*Lennar Homes of Cal., Inc. v. Stephens* (2014) 232 Cal.App.4th 674, 680.) The movant initially has the burden of proving that the "principal thrust or gravamen" of plaintiff's claims is based on conduct that furthered the movant's exercise of free speech in connection with an issue of public interest. (*Id.* at 679-80.) If the movant thus establishes that the anti-SLAPP statute applies, the burden shifts to the plaintiff to prove that (1) the commercial-speech exemption applies (see *Simpson Strong-Tie Co. v. Gore* (2010) 49 Cal.4th 12, 26); or (2) a probability of succeeding on its claims (*Lennar Homes*, 232 Cal.App.4th at 679-80).

Six4Three conceded that its claims against the Individual Defendants were based on the Individual Defendants' exercise of free speech in

2018, <https://newsroom.fb.com/news/2018/12/response-to-six4three-documents/> [as of Jan. 30, 2019].)

connection with an issue of public interest. And it forfeited any argument that the commercial-speech exemption applies or that Six4Three had a probability of succeeding on its claims. Even if this Court were to consider the forfeited arguments Six4Three now attempts to raise on appeal, those arguments are unsupported by law or admissible evidence, and provide no basis to disturb the decision below.

I. SIX4THREE DID NOT ESTABLISH THAT THE COMMERCIAL-SPEECH EXEMPTION APPLIES TO ITS CLAIMS.

Six4Three forfeited its argument under Section 425.17's commercial-speech exemption by failing to raise it below. (See *FDIC v. Dintino* (2008) 167 Cal.App.4th 333, 355.) In any event, even if Six4Three had preserved its argument, it would fail on the merits: Six4Three did not produce admissible evidence showing that the commercial-speech exemption applies here, nor could it.

A. The Trial Court Properly Declined To Consider Arguments Not Made In Six4Three's Memorandum of Points And Authorities.

To establish that the commercial-speech exemption applies, Six4Three had the burden of showing that:

(1) Facebook is "primarily engaged in the business of selling or leasing goods or services";

(2) the claims arise from Facebook's "representations of fact about that person's or a business competitor's business operations, goods, or services";

(3) the statement or conduct was made to promote, secure sales of, or commercial transactions in, Facebook's goods or services; *and*

(4) the "intended audience is an actual or potential buyer or customer." (*Simpson Strong-Tie*, 49 Cal.4th at 30; Code Civ. Proc. § 425.17.)

Six4Three did not even *mention* any of these elements in its

memorandum below. All Six4Three said about the commercial-speech exemption appeared in a heading: “The Commercial Speech Exemption Applies.” (CAA4840.) That heading was not supported with any argument, analysis, or citations to law or fact. Accordingly, the trial court was justified in deeming the issue abandoned: “When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary.” (*Ochoa v. PG&E* (1998) 61 Cal.App.4th 1480, 1488 n.3; *Landry v. Berryessa Union Sch. Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

Six4Three argues that it preserved its commercial-speech argument with a single sentence: “Plaintiff incorporates the arguments raised in its oppositions to Facebook’s Anti-SLAPP Motion, including the applicability of the commercial speech exemption of Cal. Code Civ. Proc. § 425.17(c),” which then cited nearly 40 pages of briefing in four separate briefs. (CAA4840.) Six4Three claims that Rule 3.1110(d) of the California Rules of Court permitted it to do this, and that the trial court erred in declining to review and consider the arguments in those other briefs.

This Court reviews interpretations of the California Rules of Court *de novo*. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 81.) It reviews for abuse of discretion whether a trial court’s action falls within the permissible range of options set by the legal criteria. (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 452.) Six4Three is wrong that the Rule compels a trial court to accept arguments that are not set out in the papers for the motion under submission. And the trial court properly exercised its discretion to reject dozens of additional pages of briefing—especially because it had previously, and repeatedly, admonished Six4Three *not* to incorporate legal arguments by reference.

1. The Superior Court Did Not Abuse Its Discretion.

The Superior Court acted well within its discretion in declining to

consider arguments that were not articulated at all in the briefing before it, but were purportedly incorporated by reference to four entire briefs addressing a separate motion filed by a different party. Nothing in the Rules of Court forecloses that common-sense approach.

Rule 3.1110(d) does not permit a party to forgo all argument and authority in favor of a blanket incorporation of arguments in other briefs. That Rule merely states that “[a]ny paper previously filed must be referred to by date of execution and title.” (Cal. Rules of Court, rule 3.1110(d).) That rule of citation form says nothing about evading page limits by incorporating dozens of pages of prior argument, and it does not purport to excuse a party of its obligation to include “a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced.” (*Id.*, rule 3.1113(b).)

Six4Three cites two cases; neither supports its expansive view of Rule 3.1110(d). *Roth v. Plikaytis* (2017) 15 Cal.App.5th 283 addressed the ability of a litigant to incorporate by reference documents as *evidence* in support of the litigant’s argument in a fee motion—which the Fourth District recognized was akin to the long-established practice of incorporating by reference documentary evidence in summary judgment papers. (*Id.* at 292.) *Larsen v. Johannes* (1970) 7 Cal.App.3d 491 similarly involved the incorporation of documentary evidence—including contracts and letters—into a motion for summary judgment. Neither case involved the incorporation of and reliance on prior *briefing* to satisfy a litigant’s obligation to make legal *arguments* it wants a court to consider.

The presentation of legal arguments to a court is governed by Rule 3.1113(b), which requires that a “[m]emorandum must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced.” Six4Three’s one-sentence cross-reference to other

briefs does not satisfy any of these elements.

Rule 3.1113(b) parallels Rule 8.204, which governs briefs in this Court and requires that briefs “[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority.” (Cal. Rules of Court, rule 8.204.) California courts have uniformly interpreted Rule 8.204 as requiring a party to present the arguments in support of each point in its brief; if a party fails to do so, and instead merely incorporates by reference arguments made in its trial court papers, the party forfeits the points. (See, e.g., *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 294 n.20; *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656; *Garrick Dev. Co. v. Hayward Unified Sch. Dist.* (1992) 3 Cal.App.4th 320, 334.) “This rule is designed to lighten the labors of the [courts] by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass.” (*Keyes*, 189 Cal.App.4th at 656; cf. Code Civ. Proc § 437c(b)(7) [at summary judgment, prohibiting incorporation by reference of an “entire file” on the court’s docket].)

This reasoning fully applies to Rule 3.1113(b). The rules do not permit Six4Three to impose on the trial court the burden of sifting through dozens of pages of unrelated briefing to identify and evaluate Six4Three’s arguments and how they might apply to the Individual Defendants’ anti-SLAPP motion.

2. Incorporation Of Six4Three’s Prior Briefs Would Have Resulted In A Substantially Oversized Brief.

Even if it were permissible, on a limited basis, for a party to incorporate arguments from previous briefs to supplement arguments articulated in a current brief, the trial court correctly found that using

incorporation of *four full briefs* as a *complete* substitute for argument here would violate Rule 3.1113(d)'s provision that "no opening or responding memorandum may exceed 15 pages."

Six4Three's opposition was already at the 15-page mark even without taking the incorporated briefs into account. With the incorporated briefs, its opposition totaled 54 pages. Six4Three argues that the trial court abused its discretion in counting the 39 pages of briefing Six4Three sought to incorporate towards the page limit. But the only basis Six4Three advances to find abuse is the lack of a rule or case explicitly counting improperly incorporated arguments toward the page limit. Six4Three gets it backward: because points and arguments are supposed to be made in a memorandum, there is no reason for a rule addressing the treatment of arguments that are *not* made in a memorandum. Six4Three points to no authority for its position, and no wonder: if parties could incorporate dozens of pages of arguments from previously filed documents, the page limit would be meaningless. For this reason, courts across the country have regularly rejected similar attempts to evade page limits by incorporating by reference substantive arguments from other briefs.¹⁰

¹⁰ See, e.g., *Calence, LLC v. Dimension Data Holdings, PLC* (9th Cir. 2007) 222 F. App'x 563, 566 ["The district court did not abuse its discretion in refusing to consider the argument contained in prior briefing ... that [plaintiff] attempted to incorporate by reference into its motion for a preliminary injunction in violation of local page limits."]; *Gaines-Tabb v. ICI Explosives, USA, Inc.* (10th Cir. 1998) 160 F.3d 613, 623-24 ["Allowing litigants to adopt [arguments from other filings] would provide an effective means of circumventing the page limitations on briefs set forth in the appellate rules . . . and unnecessarily complicate the task of an appellate judge."]; *Rep. of Kazakhstan v. Ketebaev* (N.D. Cal. June 8, 2018) 2018 WL 2763308, at *10 ["[I]nclusion of the pages [plaintiff] purports to incorporate by reference would cause [its] opposition to exceed the page limits ..."]; *Energetiq Tech., Inc. v. ASML Netherlands B.V.* (D. Mass. July 10, 2015) 113 F.Supp.3d 461, 468 ["Defendant may not circumvent memoranda page limit requirements . . . by purporting to incorporate arguments from its

3. No Abuse Of Discretion Can Arise From The Speculation That Six4Three Might Have Obtained Leave To File An Oversized Brief—Leave It Never Sought.

A memorandum that exceeds the page limit in the Rules “must be filed and considered in the same manner as a late-filed paper” (Cal. Rules of Court, rule 3.1113(g))—which a “court, in its discretion, [may] refuse[] to consider” (*id.* rule 3.1300(d)). (See, *e.g.*, *Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 261-62 [upholding refusal to consider late-filed papers]; *Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 657 [same].) The trial court’s “broad discretion to accept or reject late-filed papers,” especially when the tardy party “made no attempt to seek leave” (*Rancho Mirage*, 2 Cal.App.5th at 262), necessarily applies to overlength papers as well under Rule 3.1113(g).

Six4Three argues that the court nevertheless abused its discretion by not considering the extra 39 pages of briefing because Six4Three *could* have sought leave to file an oversized brief (see Cal. Rules of Court, rule 3.1113(e)), and the Superior Court *might* have granted leave if Six4Three had asked for it. But Six4Three made no such request, let alone the necessary showing of “reasons why the argument cannot be made within the stated limit” (*ibid.*), and its counsel acknowledged, “I think I have to fall on my sword on that one.” (2RT142:20-21.)

And contrary to its assertion here, Six4Three had *ample* “reason to believe it needed to request permission to file a longer brief under rule 3.1113(e).” (CAOB 24.) Six4Three had been admonished by the court both for trying to evade page limitations (1RT38:24-39:2) and for citing and

previous papers”]; *Masimo Corp. v. Philips Elec N. Am. Corp.* (D. Del. 2014) 62 F.Supp.3d 368, 376-77 [“Underlying briefs cannot be ‘incorporated by reference’ as a way of avoiding the page limits”].

incorporating material from separate documents such that “everything [was] in pieces” rather than contained in one coherent brief. (1RT38:21-23; CRA00097-98.) Six4Three chose to ignore those warnings.

Contrary to Six4Three’s claim, the court did *not* suggest that it would have granted a request for additional pages if Six4Three had made one. (CAOB 24.) Six4Three quotes part of a hearing transcript where the court noted that relief from the page limits was available, but omits the court’s observation that, “actually, you didn’t ask. You just incorporated that on your own without seeking relief of the Court to do so.” (2RT142-43.) Six4Three provides no reason why the court should have allowed it to file a 54-page memorandum to respond to the Individual Defendants’ 15-page memorandum. (See Cal. Rules of Court, rule 3.1113(e); cf. *In re Marriage of Green* (1989) 213 Cal.App.3d 14, 28 [noting court’s denial of appellant’s request to file a brief in excess of page limit because there was “no reason for such a lengthy brief”].)

There would have been good reason to deny any request to file an oversized brief. As noted above, Six4Three did not seek to *supplement* an argument in its brief by incorporating a few pages from other briefs; it sought to *substitute* 39 pages of arguments in other documents for the yawning gap in its principal brief. Six4Three did not even *try* to streamline its presentation; it block-cited entire briefs without referencing the relevant page or pages. (Cf. Cal. Rules of Court, rule 3.1113(k) [requiring page references in citations to exhibits and declarations].) And these cited briefs were in *addition* to the thousands of pages Six4Three sought to incorporate through exhibits to improper declarations.

4. No “Policy” Requires Trial Courts To Overlook Flagrant Violations Of The Rules.

Finally, Six4Three argues that the trial court’s decision to consider only the arguments made and supported in its memorandum “[v]iolated” this

Court's policy favoring disposition of cases on their merits. (CAOB 25.) In essence, Six4Three argues that courts cannot enforce rules—whether page limits, deadlines, or waiver of arguments—where doing so would result in a party's argument not being considered. That is absurd. A policy favoring trial on the merits “cannot be indiscriminately applied so as to render” the rules “impotent.” (*Landry*, 39 Cal.App.4th at 698.) Instead, the policy is only applied where the plaintiff shows that its failure to comply with the rules was excusable and “has demonstrated dismissal would effect a miscarriage of justice. (*Id.*; see also *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855 [policy applies only where a party “attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary”]..)

Six4Three has made no such showing here. As explained above, Six4Three's effort to escape the page limits was deliberate, flagrant, and prejudicial. Moreover, no miscarriage of justice resulted: This is not a case where Six4Three was deprived of any opportunity to be heard. Six4Three filed a 15-page brief, just as the Individual Defendants did. Six4Three chose to use those pages to bait the media with irrelevant and groundless allegations, rather than engaging with the Individual Defendants' arguments. It cannot now complain that its deliberate strategy backfired.

B. Six4Three's Other Briefs Did Not Establish That The Commercial-Speech Exemption Applies.

Even if the trial court had considered Six4Three's other briefs, the result would have been the same. The commercial-speech exemption in Section 425.17 is “narrowly construed.” (*Simpson Strong-Tie*, 49 Cal.4th at 22; see also *Dean v. Friends of Pine Meadow* (2018) 21 Cal.App.5th 91, 98.) The party seeking to invoke the exemption must show that *all* of the requisite elements are met. (See *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 717-18.) And a trial court's finding that a party failed to carry its burden of proof may be reversed only if the appellant's evidence

was “(1) uncontradicted and unimpeached and (2) of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” (*Monster Energy Co. v. Schechter* (2018) 26 Cal.App.5th 54, 64 [internal quotation marks omitted].) Six4Three falls far short of that high bar.

1. Six4Three Failed To Establish That Facebook Is Primarily Engaged In The Business Of Selling Or Leasing Goods Or Services.

Six4Three’s incorporated briefs cannot satisfy its initial burden because Six4Three entirely forfeited the argument that Facebook is “primarily engaged in the business of selling or leasing goods or services.” (Code Civ. Proc. § 425.17(c).) The referenced briefs did not even address this threshold element of the commercial-speech exemption. (See CAA630-650, 1312-1324, 1423-1435, 1536-1543; AA0510-30.) Having repeatedly forfeited this argument, Six4Three cannot raise it on appeal. (See, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 872-73; see also *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 782-83; *Fremont Reorganizing Corp. v. Gaigin* (2011) 198 Cal.App.4th 1153, 1177 n.8.)

In any event, the argument fails on the merits. Division Two of this District has already held that, “while Facebook sells advertising, it is not ‘*primarily* engaged in the business of selling or leasing goods or services.’” (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 203 [emphasis added; quoting Code Civ. Proc. § 425.17(c)].) Like the plaintiff in *Cross*, Six4Three has not alleged, much less proved, that Facebook is *primarily* engaged in the business of selling goods or services. “Nor could [it], as Facebook offers a free service to its users” and developers. (*Ibid.*) Indeed, Six4Three has acknowledged that Facebook does not charge developers for using its Platform. (CAA000865; AA0744.)

Having completely ignored its burden on the issue below, Six4Three now tries to distinguish *Cross* on the ground that the plaintiff in that case was a Facebook user. (CAOB 32.) That distinction is irrelevant. Whether Facebook is “primarily engaged in the business of selling or leasing goods or services” does not turn on the identity of the plaintiff, but on *Facebook’s* business. (See *Dean, supra*, 21 Cal.App.5th at 105 [explaining that this requirement of the exception “focus[es] on *the speaker*”] [emphasis added; internal quotation marks omitted].) The relevant question is whether the “bulk of Defendant’s business” involves selling goods or services. (*New.Net, Inc. v. Lavasoft* (C.D. Cal. 2004) 356 F.Supp.2d 1090, 1103.) Six4Three presented *no* evidence establishing that this is the case for Facebook.

Even though *Cross* directly addresses Facebook, Six4Three argues that this Court should ignore that case in favor of *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, which denied an anti-SLAPP motion on commercial-speech grounds based on the business of a different website. The plaintiff in *Demetriades* was an *advertiser* on Yelp, a website and search engine for local businesses that *sells advertising* to generate revenue. (228 Cal.App.4th. at 300-01.) Based on evidence including Yelp’s statement in its SEC Form 10-Q that its “one business activity” was selling advertising,¹¹ the Court of Appeal held that Yelp is “primarily in the business of providing advertising to businesses”; the user reviews were merely a “device . . . to attract users and ultimately purchasers of advertising on its site.” (*Id.* at 312.)

Demetriades is inapposite here. Six4Three insists that, because both Yelp and Facebook sell advertising, they should be treated the same for the purpose of the commercial-speech exemption. But “[j]ust because [a d]efendant operates a business and sells . . . products, does not mean that [the

¹¹ Appellant’s Reply Brief, *Demetriades v. Yelp, Inc.* (B247151, Feb. 5, 2014) 2014 WL 508582, at *31.

d]efendant is *primarily* engaged in the business of selling goods.” (*New.Net*, 356 F.Supp.2d at 1103.) Unlike the plaintiff in *Demetriades*, Six4Three did not present *any* evidence about Facebook’s business, much less evidence sufficient to show that Facebook’s business was “primarily” selling advertising.¹² Six4Three did not show that Facebook’s social network, or the other services that it provides to users and developers, are merely incident to its sale of advertising. For example, there was no evidence about the amount of Facebook’s operations devoted to advertising, as opposed to research, development of (free) products and services, and supporting existing (free) products and services. Without competent evidence, Six4Three failed to demonstrate that the commercial-speech exemption applies. (See, *e.g.*, *Rivera*, 187 Cal.App.4th at 718; Code. Civ. Proc. § 425.16(b)(2).)

2. Six4Three Did Not Satisfy The Other Elements Of Section 425.17(c).

Six4Three also did not and cannot establish that its causes of action satisfy the other elements of the commercial-speech exemption.

First, none of the claims arises from statements or conduct by the Individual Defendants that constitute “representations of fact about” Facebook’s “business operations, goods, or services.” (Code Civ. Proc. § 425.17(c)(1).) Six4Three identifies three sets of statements—made years before Six4Three existed—that allegedly satisfy this element. Those statements, Six4Three claims, were promises that (1) developers would “have ‘deep integration’ and access to social data in order to build their applications on the Facebook Platform”; (2) developers were on a level

¹² The only “evidence” Six4Three cites is a quote from a third party in an online article stating that Facebook and Google together captured the majority of the growth in the digital advertising industry in 2017. (CAOB 31 [citing 4 CAA 1439].) This inadmissible double hearsay can play no part in an anti-SLAPP analysis, and does not establish that digital advertising is the *primary* business of Facebook.

playing field with other developers and Facebook itself; and (3) Facebook was committed to providing a platform for developers to build applications and monetize their businesses. (CAOB 34-35.)

None of these statements was made by any Individual Defendant besides Mr. Zuckerberg. Accordingly, the commercial-speech exemption cannot apply to the causes of action against Mr. Cox, Mr. Olivan, Mr. Lessin, Mr. Vernal, or Mr. Sukhar. More fundamentally, Mr. Zuckerberg's statements do not qualify as "representations of fact" about any "specific or absolute characteristic of a product." (*Demetriades*, 228 Cal.App.4th at 311.) Even if they could be fairly characterized as promises, "[a] promise is not a representation of fact." (*Navarro v. IHOP Properties, Inc.* (2005) 134 Cal.App.4th 834, 841.)

Second, none of the statements was made "for the purpose of obtaining approval for, promoting, or securing *sales* ... of ... goods or services." (Code Civ. Proc. § 425.17(c)(1) [emphasis added].) Six4Three argues that these alleged promises "were designed to induce developers to build their applications on Facebook Platform." (CAOB 35.) But as Six4Three has conceded, developers paid nothing to build their applications on the Platform. (CAA000865; AA0744.) Six4Three argues that, because applications on the Platform attracted new users, and that in turn resulted in greater advertising revenues for Facebook, the challenged statements were made for the purpose of securing sales of that advertising. (CAOB 35-36.) Once again, Six4Three cites nothing to support these assertions besides its own allegations, which do not satisfy its burden. (*Rivera, supra*, 187 Cal.App.4th at 718; Code Civ. Proc. § 425.16(b)(2).)

Moreover, the remote relationship articulated by Six4Three between the statements and any sale of advertising is too attenuated to satisfy Section 425.17's requirement that the statement or conduct be "made *for the purpose of obtaining, promoting, or securing sales.*" (Code Civ. Proc. § 425.17(c)(1)

[emphasis added].) This Court must “narrowly constru[e]” the exemption, and Six4Three’s proffered interpretation would effectively read the purpose requirement out of the exemption entirely. (*Simpson Strong-Tie*, 49 Cal.4th at 22; *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 273.)

Third, Six4Three failed to show that the “intended audience” of the statements consisted of “actual or potential buyer[s] or customer[s].” (Code. Civ. Proc. § 425.17(c)(2).) Six4Three acknowledges that the audience consisted of Facebook users (who pay nothing) and “developers,” who could build their apps on the Facebook Platform for free. (CAOB 36-37.)

II. SIX4THREE DID NOT ESTABLISH A LIKELIHOOD OF PREVAILING ON ITS CLAIMS.

Having failed to show that the commercial-speech exemption applied, Six4Three had to establish a probability of prevailing on its claims by “demonstrat[ing] the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) To do so, a party cannot rely on allegations made on “information and belief” or hearsay; rather, it must submit *admissible evidence*. (See *Evans v Unkow* (1995) 38 Cal.App.4th 1490, 1497-98; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1397.) Here, again, Six4Three failed to carry its burden. All of Six4Three’s claims are barred by the Communications Decency Act (“CDA”). And even if they weren’t, Six4Three failed to introduce admissible evidence establishing the elements of its claims.

1. The Communications Decency Act Bars Six4Three’s Claims.

The trial court correctly held that section 230 of the CDA, 42 U.S.C. § 230, *et seq.*, bars all of the causes of action against the Individual Defendants. Section 230 provides: “No [1] provider or user of an interactive

computer service [2] shall be treated as the publisher or speaker of any information provided by [3] another information content provider.” (47 U.S.C. § 230(c)(1).) “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” (*Id.* § 230(e)(3).) The California Supreme Court has described the immunity conferred by the CDA as “broad” and “robust.” (*Hassell v. Bird* (2018) 5 Cal.5th 522, 535, 539.)

On appeal, Six4Three argues that the CDA does not apply because Six4Three is not seeking to hold Facebook accountable as the publisher of user content. (CAOB 38-39.) But this argument was both forfeited by Six4Three and contradicted by Six4Three’s own admissions and allegations.

First, Six4Three waived this argument: Six4Three’s opposition did not mention the CDA, even though the Individual Defendants raised it in their motion. (CAA1518-1521.) (*FDIC, supra*, 167 Cal.App.4th at 355). The arguments were not effectively incorporated by reference (CAOB 22-23; *see pp.* 28-34 *supra*), particularly because Six4Three’s only mention of the other briefs appeared under the heading “The Commercial Speech Exemption Applies.” (CAA4840.) To the extent that Six4Three *intended* to (improperly) incorporate any arguments about the CDA, it failed to actually do so before the trial court.

Second, the argument is meritless. Six4Three’s counsel admitted below that the “nub of this case” is that “Facebook had internally decided, as early as 2012-2013 . . . that they were going to shut down the platform; that they were going to basically, instead of making all of this data available to all app developers . . . [w]hat they decided to do is shut off access to the data.” (1RT23:16-24:5.) That decision falls squarely within the role of a publisher: “deciding whether to publish certain material or not.” (*Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 573; *see ibid.* [decision “to restrict or make available certain material . . . is expressly covered by section

230”].) “[P]ublication involves reviewing, editing, and deciding whether to publish or to *withdraw from publication* third-party content.” (*Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1094 [emphasis added; quotation marks omitted].) Accordingly, “any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.” (*Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1170-71.) That is what Six4Three challenges here.

Six4Three cannot avoid this conclusion through “creative pleading” or argument that purports to premise liability on Facebook’s *statements* about its publication decisions. (*Hassell*, 5 Cal.5th at 527.) In applying the CDA, courts must focus on the “substance” of the plaintiff’s claim. *Id.*, 5 Cal.5th at 542. A plaintiff therefore cannot avoid section 230 “simply by changing the name of the theory” (*Barnes v. Yahoo., Inc.* (9th Cir. 2008) 570 F.3d 1096, 1102) and recasting its claim as a challenge to the defendant’s statements about what and how it will publish, rather than the underlying decision about what to publish. (*See Hassell*, 5 Cal.5th at 541.) Otherwise, plaintiffs could “maneuver” to “subvert a statutory scheme intended to promote . . . industry self-regulation.” (*Id.* at 546.)

That is why *Cross* held that the CDA barred claims for breach of contract, negligent misrepresentation, and negligent interference: It rejected the plaintiff’s attempt to characterize his claims as seeking to enforce Facebook’s promises, because his allegations made clear that what he was *really* complaining about was Facebook’s failure to remove content posted by others. (14 Cal.App.5th at 206-07.) Six4Three—which cannot even point to a “legally enforceable promise”—is not seeking to enjoin Facebook’s statements about its Platform or to obtain a refund of money spent on advertising. Instead, Six4Three seeks damages and injunctive relief that would directly constrain Facebook’s decisions about the availability of

content posted by users' friends. The whole point of Six4Three's lawsuit is access to third-party content that Facebook has chosen *not* to make available.¹³

Six4Three also argues that the CDA does not apply because (1) Facebook removed content only from the Facebook Platform, not the main Facebook website,¹⁴ and (2) Facebook allegedly restricted dissemination of that content only to some developers, not all developers. (CAOB 39-40.) Six4Three does not explain why these fine distinctions make any legal difference, and nothing in the CDA or case law suggests that they do. To the contrary, the CDA's protection extends beyond the original publication of content to encompass further distribution of that content through other avenues. (See, e.g., *Garrett v. Rosenthal* (2006) 40 Cal.4th 33, 62.) And defining the audience to whom particular content is made available falls squarely within the role of a publisher and is accordingly protected by the CDA. (See, e.g., *Sikhs for Justice, supra*, 144 F.Supp.3d at 1094-95; *Cohen v. Facebook, Inc.* (E.D.N.Y. 2017) 252 F.Supp.3d 140.)

2. Six4Three Did Not Submit Admissible Evidence Showing A Probability Of Success In Proving The Elements Of Its Claims.

Six4Three failed to establish with competent, admissible evidence that it had a probability of success. Instead, Six4Three relies on conclusory

¹³ In contrast, the plaintiffs in *Demetriades* sought only to enjoin Yelp from making misleading statements about its filters (228 Cal.App.4th at 313), relief that would "not affect the content . . . or the availability of Yelp's reviewers' statements" (*id.* at 312).

¹⁴ Six4Three's brief repeatedly confuses APIs and the content *accessible* via APIs. For example, the brief states that "[s]ome APIs, such as the User ID and Friends List APIs, are not even user-created; the data are entirely created by Facebook." (CAOB 40.) Facebook APIs are distinct from the data and content posted to Facebook and the Platform. An API enables others to see and use content on the Facebook Platform.

allegations that cannot satisfy its burden, and mischaracterizes the few documents it cites. And Six4Three makes virtually no attempt to connect the *Individual Defendants* to the conduct about which it complains.

a. *Six4Three's Intentional And Negligent Misrepresentation Claims Fail.*

Six4Three did not establish *any* element of its intentional and negligent misrepresentation claims.

No actionable misrepresentations. First, Six4Three fails to identify any misrepresentation by the Individual Defendants. Six4Three lists eight statements made by Facebook in 2007 about the launch of the Facebook Platform that it claims are misrepresentations. (CAOB 42-43.) But it presented no evidence that any *Individual Defendant* made any of those statements to anyone outside of Facebook.

Six4Three also presents no evidence that any of those statements was false or misleading when made. Instead, Six4Three claims that Facebook decided *five years later* to restrict access to certain data on its Platform in a manner that was purportedly inconsistent with its earlier statements. (CAOB 43.) In other words, Six4Three's theory is that Facebook's earlier statements were perpetual promises to give developers permanent, free, and equal access to Facebook's data and content. But a plain reading of those statements reveals no such promise. Those statements merely express Facebook's intention that, upon its launch in 2007, Facebook's Platform would enable third party developers to "now create" and "now build" applications that have the "same level of integration" as Facebook applications. (CAOB 42.) None of the statements says anything about the Platform's characteristics in the future, let alone years later.

Even if read as such a promise, a promise of future conduct is only actionable if it was "made without any intention of performing it." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158.) Six4Three

neither alleged nor submitted admissible evidence that Facebook made statements in 2007 about the Facebook Platform with no intention of following through. Nor could it: Six4Three alleges that it was not until 2012 that Facebook decided to depublish friend content from the Platform.

Six4Three asserts generally that [REDACTED]

[REDACTED]
(CAOB 43.) But Six4Three fails to identify any specific statements [REDACTED]
[REDACTED] that were misrepresentations.

No reasonable reliance. Six4Three also did not present evidence “sufficient to show that [it] actually and reasonably relied on the alleged misrepresentations.” (*Garcia v. Superior Court* (1990) 50 Cal.3d 728, 737 [negligent misrepresentation]; *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 434 [same as to intentional misrepresentation].) Six4Three points to no evidence that it was exposed to or aware of Facebook’s statements, much less relied on them. (CAOB 43.)

Nor could Six4Three have reasonably relied on purported assurances that Facebook would allow developers to read and use content posted by users’ friends—for free and in perpetuity—given the contrary terms of the SRR. The December 2012 SRR specifically provided that Facebook could limit Six4Three’s access to data, including users’ content and information, and that “[t]his Statement makes up the entire agreement between the parties regarding Facebook, and supersedes any prior agreements.” (CAA00558, 00562; AA0441, 0445.) And the SRR specifically directed developers to the Platform Page, which notified developers of Facebook’s ability to make breaking changes with 90 days’ notice. (CAA00563; CRA00078; AA0040, 0446.)¹⁵ Because the alleged promises “contradicted the parties’ integrated

¹⁵ “Breaking changes” are changes to Facebook’s Platform that would require developers to make a code change in their apps. (See AA0040.)

... agreement,” Six4Three could not reasonably rely on them. (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612.)

b. *Six4Three’s Concealment Claim Lacks Legal And Evidentiary Support.*

Six4Three’s concealment claim fares no better. Six4Three claims that the Individual Defendants concealed the supposed fact that Facebook had decided in 2012 to restrict dissemination of certain friend content via the Platform. (CAOB 44.) Even assuming *arguendo* that Facebook made such a decision (which it did not), Six4Three failed to show that the Individual Defendants had a duty to disclose it, or that their alleged breach of such a duty induced Six4Three to act to its detriment. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868-69.) It did not even show that all the Individual Defendants were even employed by Facebook at the relevant time.

Six4Three claims that Individual Defendants owed Six4Three a “duty to disclose material facts” because “[t]he parties were in a business relationship by virtue of the SRR.” (CAOB 44.) Six4Three is wrong on two accounts.

First, Six4Three did not have *any* relationship with the Individual Defendants; it does not claim that any of its representatives ever interacted with, or even met, any of the Individual Defendants. Its relationship under the SRR was with *Facebook*. And Six4Three has not even attempted to show that this is one of the “narrowly defined circumstances” in which courts disregard a corporation’s “separate and distinct” existence from its officers. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 411.)

Second, even if Six4Three could establish that it had a business relationship with the Individual Defendants, it is well established that a “commercial relationship” does not give rise to a duty to disclose. (*Los Angeles Mem. Coliseum Commission v. Insomniac, Inc.* (2015) 233

Cal.App.4th 803, 832.) Six4Three claims that its relationship with Facebook (again, not with the Individual Defendants) was transformed into a fiduciary relationship because Six4Three was “obligated to provide its confidential and proprietary information to Facebook.” (CAOB 44.) But the only evidence Six4Three cites for this proposition is a provision of the SRR stating that any content or information a user chooses to post on Facebook is owned by the user, and that the user grants Facebook a license to use any intellectual property rights needed to publish that content until the user deletes the content or account. (CAOB 44 (citing SCAA002687).) Nothing about this provision obligates *Six4Three* to provide Facebook with confidential and proprietary information. Six4Three offers no evidence that it ever provided any such information. In any event, business relationships often involve the sharing of confidential information; that sharing does not confer fiduciary status. (See, e.g., *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 385-392; *Worldvision Enterprises, Inc. v. Am. Broadcasting Cos.* (1983) 142 Cal.App.3d 589, 595.)

Six4Three also argues that the Individual Defendants owed a duty to Six4Three because they provided “partial, misleading information to Six4Three about Facebook’s provision of its APIs.” (CAOB 45.) Yet Six4Three does not identify any statements, much less show how they are partial and misleading.

c. *Six4Three’s Tortious Interference Claims Are Unsupported By Any Admissible Evidence.*

Six4Three’s tortious-interference claims are similarly unsupported; indeed, before Six4Three added the Individual Defendants the district court dismissed these claims as against Facebook *with prejudice*, because even its allegations were insufficient to state such a claim. (CRA000102.) Six4Three’s burden of proof on the Individual Defendants’ anti-SLAPP motion was even higher, and equally unsatisfied. To prove interference with

either a contract or prospective economic relations, Six4Three had to establish, with evidence, (1) that Six4Three had a valid contract or an economic relationship that was reasonably likely to produce economic advantage with a third party, (2) that the Individual Defendants knew of that relationship, and (3) that they took intentional steps designed to induce a breach or disruption of the relationship. (*Quelimane Co. v. Steward Title Guar. Co.* (1998) 19 Cal.4th 26, 55; *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1152 n.6.) Once again, Six4Three made spurious legal arguments and offered *no* evidence to support its baseless assertions.

Nor could it, as Six4Three did not enter into any contract or economically advantageous relationship with third parties, if at all, until *after* Facebook announced that developers would no longer be able to see or use friends' photos and other content. (CAA001553.) No such relationships existed when Facebook allegedly decided in 2012 to restrict developers' access to content posted by its app users' friends, nor when Facebook announced in 2014 that such access would be limited. The Individual Defendants could not have known of contracts and relationships that did not exist, much less engage in intentional acts designed to disrupt them.

d. *Six4Three Presented No Evidence Supporting Its UCL Claim.*

Six4Three likewise failed to present evidence sufficient to show a probability of success on its UCL claim.

Six4Three failed to present any evidence of an unlawful or fraudulent act by the Individual Defendants. For the reasons explained above (*supra* at pp.43-46), Six4Three failed to show that the Individual Defendants unlawfully misrepresented or concealed any information. And Six4Three *expressly disclaimed* reliance on any violation of federal law, which would include the July 2012 Federal Trade Commission order that Six4Three now attempts to invoke. (CAOB 48; *see* Doc. 29 at 1, No. 3:17-cv-00359 (N.D.

Cal. Feb. 14, 2017).) Six4Three has accordingly abandoned and waived these arguments. (*Landry*, 39 Cal.App.4th at 699-700.)

Nor did Six4Three present evidence of an “unfair” act—*i.e.*, conduct that constitutes or threatens an incipient violation of the antitrust laws or “otherwise significantly threatens or harms competition.” (*Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 187.) Where a litigant seeks to rely on the latter category of conduct, as Six4Three does here, it must be “tethered to specific constitutional, statutory or regulatory provisions.” (*Gregory v. Albertson’s, Inc.* (2002) 104 Cal.App.4th 845, 854.)

The only constitutional, statutory, or regulatory provision identified by Six4Three is the Cartwright Act. But Six4Three did not make any Cartwright Act argument below (SCAA004943), and once again provides no supporting evidence. Six4Three argues that it produced evidence that “Defendants” entered into tying arrangements with certain companies [REDACTED] [REDACTED] (CAOB 47 (citing SCAA002623-2661).)¹⁶ A tying arrangement is “a requirement that a buyer purchase one product or service as a condition of the purchase of another.” (*Morrison v. Viacom, Inc* (1998) 66 Cal.App.4th 534, 540.) Six4Three does not and cannot offer any proof of an arrangement here; even their baseless allegations fail to describe any illegal tying.

None of the documents cited by Six4Three suggests that Facebook, much less the *Individual Defendants*, required any developers [REDACTED]

[REDACTED]¹⁷ This is not surprising, as

¹⁶ Six4Three did not submit any evidence of relevant markets or anticompetitive conduct that might support the “oligopol[y]” claims it pleaded.

¹⁷ “[A]n owner or officer of a corporation may be individually liable under the UCL if he or she actively and directly participates in the unfair

Six4Three concedes that developers never had to pay for API access. Instead, the documents cited by Six4Three discuss (1) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; (2) [REDACTED]
[REDACTED]
[REDACTED] (SCAA002623-27); and (3) [REDACTED]
[REDACTED] (SCAA002628-2640). These topics have nothing to do with any “tying arrangements.”¹⁸

Six4Three alternatively seeks to base its UCL claim on the allegation that “Defendants” threatened or harmed competition by limiting some developers’ access to certain content that Facebook had previously made available on the Platform.¹⁹ (CAOB 46-47.) But again, Six4Three offered no allegations, much less evidence, that the *Individual Defendants* limited any developer’s access. Moreover, Six4Three does not connect this alleged

business practice.” (*Bradstreet v. Wong* (2008) 161 Cal.App.4th 1440, 1458, abrogated on other grounds by *Martinez v. Combs* (2010) 49 Cal.4th 35; see also *United States Liab. Ins. Co. v. Haidinger-Hayers, Inc.* (1970) 1 Cal.3d 586, 595.)

¹⁸ Six4Three does not even try to identify evidence establishing the elements of a tying claim under the antitrust laws, which would require proof that “(1) ... the sale of the tying product [or service] was linked to the sale of the tied product or service; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; (3) a substantial amount of sale was effected in the tied product; and (4) the complaining party sustained pecuniary loss as a consequence of the unlawful act.” (*UAS Mgmt., Inc. v. Mater Misericordiae Hospital* (2008) 169 Cal.App.4th 357, 369; *Morrison*, 66 Cal.App.4th at 541-42.)

¹⁹ Six4Three also tries to incorporate allegations made in its Fifth Amended Complaint. (CAOB 47 n.8.) But a party cannot rely on its own allegations to meet its burden of proving a probability of succeeding on its claims.

conduct to any constitutional, statutory, or regulatory provision. Nor does Six4Three set forth a viable theory of a threat or harm to *competition*, as opposed to harm to *competitors*. (*People's Choice Wireless, Inc. v. Verizon Wireless* (2005) 131 Cal.App.4th 656, 668.) A company is not required to provide goods even to other companies that are willing to pay for the goods. (See, e.g., *Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 375 [manufacturer's refusal to sell to retailers who did not comply with minimum retail price policy not unfair under UCL]; *People's Choice Wireless, Inc.*, 131 Cal.App.4th at 668-72 [cell phone company's refusal to sell new models to retailers not unfair under UCL].) Facebook certainly was not *required* to provide other companies with *free* access to the data and content it possesses along with *free* support.

CONCLUSION

This Court should affirm the order granting the Individual Defendants' motion to strike.

Dated: May 28, 2019

MAYER BROWN LLP
Two Palo Alto Square, Suite 300
Palo Alto, California 94306-2112
DONALD FALK (SBN 150256)

By: /s/ Donald M. Falk

Donald M. Falk
dfalk@mayerbrown.com

LAUREN GOLDMAN (*pro hac vice*)
KAREN LIN (*pro hac vice*)
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020-1001
(212) 506-2500 Telephone
(212) 262-1910 Facsimile

Attorneys for Appellant Facebook, Inc., and Cross-Respondents Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar.

Document received by the CA 1st District Court of Appeal.

CERTIFICATION OF COMPLIANCE WITH RULE 8.204

In compliance with California Rules of Court, Rule 8.204(c)(1), I hereby certify that the Brief of Cross-Respondents contains 11,892 words, including footnotes, as calculated by the word processing software used to prepare the brief.

Dated: May 28, 2019

MAYER BROWN LLP
Donald M. Falk
Lauren R. Goldman
Karen W. Lin

By: /s/ Donald M. Falk
Donald M. Falk

*Attorneys for Appellant Facebook, Inc.,
and Cross-Respondents Mark
Zuckerberg, Christopher Cox, Javier
Olivan, Samuel Lessin, Michael Vernal,
and Ilya Sukhar.*

Document received by the CA 1st District Court of Appeal.

I, Cristina Henriquez, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On May 28, 2019, I served the foregoing document(s) described as:

BRIEF OF CROSS-RESPONDENTS (REDACTED)

- ☐ By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ By placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail.
- ☐ By causing the document(s) listed above to be personally served on the person(s) at the address(es) set forth below.
- ☐ By placing the document(s) listed above in a sealed overnight service envelope and affixing a pre-paid air bill, and causing the envelope, addressed as set forth below, to be delivered to an overnight service agent for delivery.
- ☒ By causing the document(s) listed above to be served electronically on the person(s) at the address(es) set forth below using the True Filing program.

Sonal N. Mehta
Laura Miller
Zachary Abrahamson
Durie Tangri
217 Leidesdorff St.
San Francisco, CA 94111
Attorneys for Appellant

Served Electronically

Allison L. Ehlert
Scotia Hicks
Ehlert Hicks LLP
2001 Addison St., Suite 300
Berkeley, CA 94704

Served Electronically

Document received by the CA 1st District Court of Appeal.

aehlert@ehlerthicks.com
shicks@ehlerthicks.com
Attorney for Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 28, 2019, at Palo Alto, California.

/s/ Cristina Henriquez
Cristina Henriquez

Document received by the CA 1st District Court of Appeal.

EXHIBIT 7

**THE LAW OFFICES OF
STEVEN GRAFF LEVINE**

1112 MONTANA AVENUE SUITE 309
SANTA MONICA, CALIFORNIA 90403
WORK 310.497.1974 FAX 310.459.8313
stevelevinelaw.com

May 30, 2019

Re: Potential Representation in Collateral Action

Dear Mr. Kramer:

You have asked me to consider representing Six4Three, LLC (the "Company") in a collateral matter defending against accusations made by Facebook, Inc. regarding a conspiracy to violate Court orders concerning the confidentiality of documents produced by Facebook in your litigation, Six4Three, LLC v. Facebook Inc., Case No. Civ. 533328, Filed on April 10, 2015 in San Mateo Superior Court (the "Collateral Action").

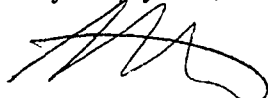
You have told me that Facebook has asserted it will seek criminal and/or civil contempt charges in addition to other sanctions against the Company. However, you are unable to produce for my review any petition, complaint, affidavit, or other pleading for any alleged violation of any provision of the California Penal Code, Civil Code, or any other pleading for criminal, civil, or other contempt or for any claimed or sought sanctions against the Company. Furthermore, I see no such petition, complaint, motion or other pleading on the public docket.

As I informed you, the required process in a criminal case substantially differs from a civil action. If you wish for me to consider representing the Company, and potentially you, I will need to understand, much better, the nature of any criminal liability. I will also need to review the formal accusations against the Company and any accusations against you as the principal of the Company, including any evidence offered in support of such allegations to determine their sufficiency as a matter of law.

Finally, if I were to agree to represent the Company, I would only do so on the condition that such representation be limited to this Collateral Action. It is my understanding that the case is otherwise stayed pending resolution of one or more SLAPP motions. Upon the conclusion of the Collateral Action, I would promptly withdraw from the case and the Company would be required to seek other counsel.

This letter in no way represents a commitment to represent the Company or to take any further action with respect to such potential representation. Please advise at your earliest convenience whether you can provide supporting documentation, so I may properly evaluate the matter.

Very truly yours,



STEVEN GRAFF LEVINE

EXHIBIT 8

Six4Three's sole investor, Thomas Scaramellino, played a central role in the disclosure of Facebook's confidential and highly confidential information. On March 18, Facebook contacted counsel for Mr. Scaramellino and asked that he either accept service of a subpoena to Mr. Scaramellino or provide Mr. Scaramellino's address. Mr. Russo refused to discharge that most basic of a lawyer's tasks: accepting service on behalf of one's client. *See, e.g.,* California Attorney Guidelines of Civility & Professionalism, Section 4(h) ("An attorney should agree to reasonable requests in the interests of efficiency and economy, including agreeing to a waiver of procedural formalities where appropriate."), *available at* http://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf; Santa Clara County Bar Ass'n Code of Professionalism at § 9 ("A lawyer should conduct discovery in a manner designed to ensure the timely, efficient, cost-effective, and just resolution of a dispute."), *available at* <https://sccba.site-ym.com/page/professionalism#9>. Instead, Mr. Russo failed to respond for days, and then belatedly provided an address for a summer vacation complex in Forestburgh, New York. Relying on Mr. Russo's representations, Facebook spent thousands of dollars attempting to serve Mr. Scaramellino at that address, but unsurprisingly, attempts to serve Mr. Scaramellino there failed.

After the Court suggested that Facebook serve Mr. Scaramellino "at his place of employment that Mr. Scaramellino previously provided in court filings," Case Mgmt. Order No. 21 at 1 (Apr. 2, 2019), Facebook was unable to confirm a current work address (Mr. Scaramellino has represented to the Court that he is a Director of TallyGo, a company whose last known business address is in Los Angeles, while also claiming to reside in New York) and asked Mr. Scaramellino's counsel to do so. Russo accused Facebook of harassment and refused to accept service or provide a service address. Left with no other option, Facebook then unsuccessfully tried to serve Mr. Scaramellino at TallyGo's last known business address in Los Angeles. This address is an apartment, and the current tenant stated that she had been living there since November 2018, did not know of TallyGo or Mr. Scaramellino, and that there was no business located at that address.

In all, Facebook attempted to serve Mr. Scaramellino multiple times over the course of four weeks at four addresses in two states (in Manhattan, in Los Angeles, and at two addresses in Sullivan County, New York, which Mr. Scaramellino revealed for the first time as his "home county" in his declaration of April 12, 2019) using four different process servers.

The Court should put a stop to the evasion. Mr. Russo should show cause why he will not accept service or provide a correct address. *See In re Holmes*, 145 Cal. App. 3d 934, 944 (1983) (finding a lawyer in contempt for "knowingly and intentionally aiding another person to evade service of a subpoena by obstructing the service of the subpoena"). Or, if he continues to refuse, Facebook requests that the Court (1) order Mr. Scaramellino to provide a correct address for service of Facebook's subpoena; or (2) order Mr. Scaramellino to appear, testify, and submit to cross-examination. At this point, Mr. Scaramellino—who is an investor and advisor to a party in this litigation, was litigating this case as a member of the legal team, and who expressly subjected himself to this Court's jurisdiction when he subscribed to the protective order—is willfully evading this Court's investigation into the crime or fraud. And Mr. Russo is helping him do so. Facebook thus renews its request that the Court order

EXHIBIT 9



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

ETHI COMMITTEE NEWS RELEASE

If you have any questions or comments regarding the accessibility of this publication, please contact us at accessible@parl.gc.ca.

Committee News Release

News Releases (ETHI)

Standing Committee on Access to
Information, Privacy and Ethics



Comité permanent de l'accès à
l'information, de la protection des
renseignements personnels et de
l'éthique

For immediate release

NEWS RELEASE

INTERNATIONAL GRAND COMMITTEE ON BIG DATA, PRIVACY AND DEMOCRACY SIGNS JOINT DECLARATION

Ottawa, May 28, 2019 -

Members of the International Grand Committee on Big Data, Privacy and Democracy have signed a Joint Declaration reaffirming their commitment to protecting fair competition, increasing the accountability of social media platforms, protecting privacy rights and personal data, and maintaining and strengthening democracy.

The document also declares the willingness of members to continue the work of the International Grand Committee with these objectives in mind.

The signing followed the morning's testimony from Roger McNamee, Author of *Zucked: Waking up to the Facebook Catastrophe*, Shoshana Zuboff, Author of *The Age of Surveillance Capitalism*, Maria Ressa, Chief Executive Officer and Executive Editor of Rappler Inc, and Jim Balsillie, Chair of the Centre for

International Governance Innovation.

The Committee also heard testimony from representatives from Facebook, Twitter and Google. Facebook's Mark Zuckerberg and Sheryl Sandberg chose to ignore the Committee's subpoena.

In response, the Committee adopted a motion to serve either or both Mark Zuckerberg and Sheryl Sandberg with a formal summons should they arrive in Canada to appear before the Standing Committee on Access to Information, Privacy and Ethics.

"Together we represent over 402 million citizens. Mark Zuckerberg's unwillingness to appear before us and give personal testimony is further evidence that his public comments about working with lawmakers rings hollow. With the signing of this joint declaration, I look forward to continuing to collaborate with our international colleagues on finding ways to protect the privacy of our citizens."

- Bob Zimmer, M.P. and Chair of the Standing Committee on Access to Information, Privacy and Ethics

"As we increasingly live our lives online, and as companies and social media platforms increasingly profit from big data and our personal information, we deserve strong privacy protections, a competitive marketplace, and a strong regulator to hold these companies accountable."

- Nathaniel Erskine-Smith, M.P. and Vice-Chair of the Standing Committee on Access to Information, Privacy and Ethics

"This declaration is the first step towards reasserting the internet as an open, democratic space for citizens, and towards a digital economy that works for more than the very largest companies. We are going to move forward with or without Mark Zuckerberg's input."

- Charlie Angus, M.P. and Vice-Chair of the Standing Committee on Access to Information, Privacy and Ethics

"Today's evidence session of the International Grand Committee has underlined the need for a legal framework to be established to regulate the major social media companies on data privacy and protecting users from harmful content.

It is the business models of these companies which have caused many of the problems we face today. That's why we cannot rely on companies like Facebook to solve them. Mark Zuckerberg's persistent refusal to appear in front of this committee shows he does not want to be held to account for the record of his company, nor even to engage openly in the debate about the future regulation and oversight we need in this sector."

- Damian Collins, M.P. and Chair of the UK Digital, Culture, Media and Sport Committee

Later this afternoon the Committee will hear from Daniel Therrien, Privacy Commissioner of Canada, Joseph A. Cannataci, UN Special Rapporteur on the Right to Privacy, and Ellen Weintraub, Chair of the United States Federal Election Commission.

Representatives will then gather together for a dinner reception to hear from each delegation about the work their countries are doing on the issues surrounding privacy protection in the digital age. Members of Canada's Standing Committee on Access to Information, Privacy and Ethics will highlight the 26 recommendations the Committee made in its report: Democracy Under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly.

Tomorrow morning the International Grand Committee on Big Data, Privacy and Democracy will hear testimony from Amazon, Apple, Microsoft and the Mozilla Corporation.

[Link to agenda](#)

- 30 -

For more information, please contact:

Michael MacPherson, Clerk of the Standing Committee on Access to Information, Privacy and Ethics

Tel: 613-992-1240

E-mail: ETHI@parl.gc.ca

EXHIBIT 10

DAVID N. CICILLINE
1ST DISTRICT, RHODE ISLAND

2244 RAYBURN BUILDING
WASHINGTON, D.C. 20515
(202) 225-4911
(202) 225-3290 (FAX)

1070 MAIN STREET, SUITE 300
PAWTUCKET, RI 02860
(401) 729-5600
(401) 729-5608 (FAX)



Congress of the United States
House of Representatives
Washington, DC 20515

March 19, 2019

CO-CHAIR, DEMOCRATIC POLICY AND
COMMUNICATIONS COMMITTEE

COMMITTEE ON THE JUDICIARY

RANKING MEMBER, SUBCOMMITTEE ON
REGULATORY REFORM, COMMERCIAL
AND ANTITRUST LAW

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

COMMITTEE ON FOREIGN AFFAIRS

SUBCOMMITTEE ON
EUROPE, EURASIA, AND EMERGING THREATS

SUBCOMMITTEE ON MIDDLE EAST
AND NORTH AFRICA

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Rohit Chopra
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Noah Joshua Phillips
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Christine S. Wilson
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Dear Chairman Simons, Commissioner Chopra, Commissioner Phillips, Commissioner Slaughter, and Commissioner Wilson:

I write to urge the Commission to open an immediate investigation into whether Facebook has violated the antitrust laws.

It has been a year since news broke that Facebook exposed user data to Cambridge Analytica, a political consulting firm that sought to manipulate voter behavior.¹ Since then, a torrent of reports has revealed that the Cambridge Analytica scandal was part of a much broader pattern of

¹ Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 million Facebook Profiles harvested for Cambridge Analytica in major data breach*, THE GUARDIAN (Mar. 17, 2018), <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>.

misconduct by Facebook.² This includes mounting evidence of anticompetitive behavior.³ Facebook's predatory acquisition strategy, foreclosure of rivals from its platform, and declining product quality strongly suggest that it has abused its position as a monopoly to undermine competition and the competitive process.

An antitrust investigation responding to these revelations should focus on at least three aspects of Facebook's conduct.

First, the Commission should examine whether any of Facebook's acquisitions substantially lessened competition in violation of Section 7 of the Clayton Act.⁴ Since its founding, Facebook has acquired over 75 companies.⁵ Two of the most significant purchases were Instagram, which Facebook bought in 2012 for \$1 billion, and WhatsApp, which Facebook purchased in 2014 for \$19 billion. Through these acquisitions, Facebook now owns three of the top four, and four of the top eight, social media apps.⁶

When Facebook acquired Instagram, the photo-based app posed a competitive threat.⁷ It was growing faster than even Facebook had at its peak and proved especially attractive to teenagers and young adults, a demographic Facebook was losing. Moreover, buying up Instagram enabled Facebook to make the switch to mobile, a market where Facebook was struggling to adapt. In

² See, e.g., Ryan Mac et al., *Growth At Any Cost: Top Facebook Executive Defended Data Collection In 2016 Memo – And Warned That Facebook Could Get People Killed*, BUZZFEED (Mar. 29, 2018), <https://www.buzzfeednews.com/article/ryanmac/growth-at-any-cost-top-facebook-executive-defended-data#.at6JrEZrk>; Hallie Detrick, *Facebook Is Sorry for Keeping the Videos You Thought You Deleted*, FORTUNE MAG. (Apr. 3, 2018), <http://fortune.com/2018/04/03/facebook-videos-delete-personal-data>; Matt Binder, *Facebook and Google accused of using 'dark patterns' to mislead users into sharing personal data*, MASHABLE (June 28, 2018), <https://mashable.com/2018/06/28/facebook-google-privacy-gdpr-deceived-by-design/#uVQFBHa0gmqg>; Sheera Frenkel et al., *Delay, Deny and Deflect: How Facebook's Leaders Fought Through Crisis*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/technology/facebook-data-russia-election-racism.html>; Josh Constine, *Facebook pays teens to install VPN that spies on them*, TECHCRUNCH (Jan. 29, 2019), <https://techcrunch.com/2019/01/29/facebook-project-atlas/>. For an ongoing list, see FREEDOM FROM FACEBOOK, *Scandals*, <http://freedomfromfb.com/scandals> (last visited Mar. 18, 2019). This reporting has spurred investigations by a bipartisan group of 37 state attorneys general, the Justice Department, the Securities and Exchange Commission, and the FBI, as well as a host of foreign governments.

³ See, e.g., Note by Damian Collins, Member of Parliament, Chair, Digital, Culture, Media and Sport Committee, U.K. Parliament, and Selected Documents Ordered from Six4Three (Dec. 5, 2018), <https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Note-by-Chair-and-selected-documents-ordered-from-Six4Three.pdf> [hereinafter "Six4Three"]; Dina Srinivasan, *The Antitrust Case Against Facebook*, 16 BERKELEY L. & TECH. J. 39, 90-98 (2019).

⁴ 15 U.S.C. § 18 (2019).

⁵ *List of Facebook's 77 acquisitions*, CRUNCHBASE, https://www.crunchbase.com/search/acquisitions/field/organizations/num_acquisitions/facebook (last visited Mar. 18, 2019).

⁶ *Most Popular Mobile Social Networking Apps in the United States as of October 2018, by Monthly Users (in millions)*, STATISTA, <https://www.statista.com/statistics/248074/most-popular-us-social-networking-apps-ranked-by-audience/> (last visited Mar. 18, 2019).

⁷ Tim Wu, *The case for breaking up Facebook and Instagram*, WASH. POST (Sept. 28, 2018), <https://www.washingtonpost.com/outlook/2018/09/28/case-breaking-up-facebook-instagram>.

hindsight, it is clear that by approving this purchase, the Commission enabled Facebook to swallow up its most significant rival in the social network market.

WhatsApp, meanwhile, threatened to outdo Facebook Messenger. As documents released by the UK Parliament reveal, Facebook had been using its surveillance tool Onavo to obsessively track WhatsApp.⁸ By doing so it learned that WhatsApp's market reach was expanding steadily, outdoing then-popular apps like Foursquare and Tumblr while also beating out Facebook Messenger in certain markets.⁹ In other words, WhatsApp "was quickly demonstrating that it could compete with Facebook on its most important battleground."¹⁰ Instead of protecting this competition—as the antitrust laws require—the Commission permitted Facebook to neuter it. And while Facebook promised at the time of the acquisition that "nothing" will change for WhatsApp users' privacy,¹¹ it has since gone on to use WhatsApp users' data for marketing purposes—a breach of its commitment.¹²

Since the Commission generally does not share with the public its analysis justifying inaction, we do not know what led the agency to approve these acquisitions. But it is clear that allowing Facebook to purchase Instagram and WhatsApp has deprived users of critical competition. As Facebook's serial disregard for users' privacy has prompted some users to delete their Facebook accounts, they find themselves unable to escape Facebook's ecosystem.¹³ Given that Facebook used spyware to systematically track and target actual, potential, and nascent rivals, it is vital to

⁸ Six4Three, at 12-15. *See also* Betsy Morris & Deepa Seetharaman, *The New Copycats: How Facebook Squashes Competition from Startups*, WALL ST. J. (Aug. 9, 2017), <https://www.wsj.com/articles/the-new-copycats-how-facebook-squashes-competition-from-startups-1502293444>.

⁹ Six4Three, at 12-15.

¹⁰ Charlie Warzel & Ryan Mac, *These Confidential Charts Show Why Facebook Bought WhatsApp*, BUZZFEED (Dec. 5, 2018), <https://www.buzzfeednews.com/article/charliewarzel/why-facebook-bought-whatsapp>.

¹¹ Facebook, WHATSAPP BLOG (Feb. 19, 2014), <https://blog.whatsapp.com/499/Facebook>; Jim Edwards, *Zuckerberg: 'It's The Only App We've Ever Seen With Higher Engagement Than Facebook Itself*, BUS. INSIDER (Feb. 19, 2014), <https://www.businessinsider.com/facebooks-investor-call-on-whatsapp-acquisition-2014-2> ("No, [Zuckerberg] said, monetization was not an issue. Facebook isn't even thinking about that right now. And no, Facebook would not run ads on WhatsApp.").

¹² EPIC, *Facebook to Collect WhatsApp Data, Violating FTC Order and Privacy Promises* (Aug. 25, 2016), <https://epic.org/2016/08/facebook-to-collect-whatsapp-u.html> ("WhatsApp's recent announcement indicates users will have 30 days to opt-out of data transfers to Facebook, in violation of the law and the FTC's Order.").

¹³ Users who decided to quit Facebook in light of its privacy breaches discovered that cutting it out entirely would require also deleting Instagram and WhatsApp. *See* Will Oremus, *If You Delete Facebook, Do You Also Have to Delete Instagram and WhatsApp?*, SLATE (Dec. 22, 2018), <https://slate.com/technology/2018/12/can-you-deletfacebook-if-you-dont-also-delete-instagram-and-whatsapp.html>; *see also id.* ("After all, the unfortunate reality is that there aren't a lot of prominent social networks that Facebook doesn't own."). *See also* <https://marketingland.com/facebook-lost-15-million-users-marketers-remain-unfazed-258164>. It's also worth noting that Facebook collects data even on non-Facebook users. Kurt Wagner, *This Is How Facebook Collects Data on You Even If You Don't Have an Account*, RECODE (Apr. 20, 2018), <https://www.recode.net/2018/4/20/17254312/facebook-shadow-profiles-data-collection-non-users-mark-zuckerberg> ("There is no way to opt out of this kind of data collection.").

examine whether any of Facebook's acquisitions—including of smaller social networks—unlawfully lessened competition.¹⁴

Second, the agency should investigate whether Facebook has engaged in exclusionary conduct in violation of Section 5 of the Federal Trade Commission Act.¹⁵ Documents reveal that Facebook has responded to competitive threats by cutting them from its network. For example, when Vine, a social application through which users can make short videos, attempted to let users find friends through Facebook's platform, Facebook quickly shut down the feature.¹⁶ The Commission should examine whether Facebook has weaponized application programming interfaces (APIs) to undermine competition.

Finally, the Commission should consider whether Facebook has abused its monopoly power in violation of Section 5 of the Federal Trade Commission Act.¹⁷ Experts have noted that while Facebook faced competition, it was not able to condition use of its network on constant surveillance; in fact, users expressly rejected this bargain.¹⁸ It was only after Facebook achieved a dominant position that it could successfully backtrack on privacy commitments and initiate widespread commercial surveillance of users.¹⁹ This dramatic decrease in privacy has amounted to quality degradation of Facebook's service. The Commission should investigate whether Facebook is using its monopoly power to degrade quality below what a competitive marketplace would allow.

Thank you for your attention to this important matter. It is critical that the Commission robustly enforce the antitrust laws to prevent anticompetitive acquisitions and anticompetitive conduct.

¹⁴ For example, in 2017 Facebook acquired tbh, a small yet fast-growing startup that had proved popular with high school students and teenagers. Hamza Shaban, *What is TBH, Facebook's newly acquired anonymous teen compliment app?*, WASH. POST (Oct. 17, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/10/17/tbh-facebooks-new-anonymous-teen-compliment-app-explained>. For an analysis of why the FTC should have scrutinized this acquisition, see Ben Thompson, *Why Facebook Shouldn't Be Allowed to Buy tbh*, STRACHERY (Oct. 23, 2017), <https://stratechery.com/2017/why-facebook-shouldnt-be-allowed-to-buy-tbh/>. Less than a year after the acquisition, Facebook shut down tbh, citing "low usage." Kaya Yurieff, *Facebook shuts the teen app it just bought*, CNN (July 3, 2018), <https://money.cnn.com/2018/07/03/technology/facebook-tbh-app-shut-down/index.html>.

¹⁵ 15 U.S.C. § 45(a)(1) (2019).

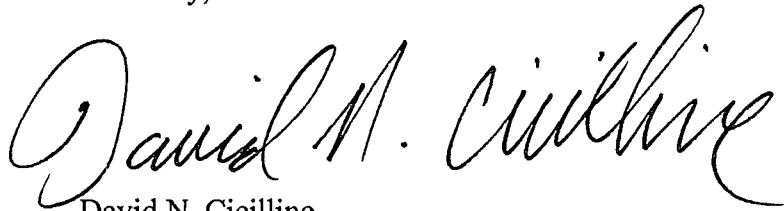
¹⁶ Six4Three, at 15, 43.

¹⁷ 15 U.S.C. § 45(a)(1).

¹⁸ Srinivasan, *supra* note 3, at 48-62.

¹⁹ *Id.* at 69-81.

Sincerely,

A handwritten signature in black ink, reading "David N. Cicilline". The signature is fluid and cursive, with the first name "David" being the most prominent.

David N. Cicilline
Chairman
Subcommittee on Antitrust,
Commercial and Administrative Law
Committee on the Judiciary

cc: The Honorable Jerrold Nadler, Chairman, Committee on the Judiciary

The Honorable Doug Collins, Ranking Member, Committee on the Judiciary

The Honorable F. James Sensenbrenner, Ranking Member, Subcommittee on Antitrust,
Commercial and Administrative Law

The Honorable Makan Delrahim, Assistant Attorney General, Department of Justice

EXHIBIT 11

RON WYDEN
OREGON

RANKING MEMBER OF COMMITTEE ON
FINANCE

221 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5244

United States Senate
WASHINGTON, DC 20510-3703

COMMITTEES:

COMMITTEE ON FINANCE
COMMITTEE ON BUDGET
COMMITTEE ON ENERGY & NATURAL RESOURCES
SELECT COMMITTEE ON INTELLIGENCE
JOINT COMMITTEE ON TAXATION

April 23, 2019

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission

The Honorable Rohit Chopra
Commissioner
Federal Trade Commission

The Honorable Noah Joshua Phillips
Commissioner
Federal Trade Commission

The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission

The Honorable Christine S. Wilson
Commissioner
Federal Trade Commission

Dear Chairman Simons, Commissioner Chopra, Commissioner Phillips, Commissioner Slaughter, and Commissioner Wilson:

I write to urge the Federal Trade Commission (FTC) to ensure that any consent order negotiated with Facebook concerning his company's unfair and deceptive practices and its mishandling of users' data holds Mark Zuckerberg, the company's Chief Executive Officer (CEO), individually liable for the company's repeated violations of Americans' privacy.

In 2011, the FTC entered into a consent decree with Facebook after finding in an eight count complaint that the company deceived consumers and mishandled their data. The Commission has now publicly confirmed that—in the wake of the Cambridge Analytica scandal last year—it is investigating Facebook for potentially violating the terms of that same 2011 consent decree.

Mr. Zuckerberg launched Facebook in 2004, and has been the public face of the company ever since, including repeatedly making promises to Facebook users over privacy and data concerns. Mr. Zuckerberg is not merely the CEO of Facebook but he also controls a majority of the voting rights in the company. This control insulates him from accountability to Facebook's board and shareholders. Internal Facebook documents, released by the British Parliament in 2018, confirm that Mr. Zuckerberg was the ultimate decision-maker regarding Facebook's user data-sharing deals with its preferred corporate partners. In his own words, Mr. Zuckerberg said to the US House of Representatives Committee on Energy and Commerce in 2018: "I started Facebook. I run it, and I'm responsible for what happens here."

According to media reports, the FTC is now negotiating another consent order with Facebook. Any settlement with Facebook must hold Mr. Zuckerberg individually accountable or his flagrant, repeated violations of Americans' privacy will continue. The FTC has the authority to hold individuals responsible for the actions of a corporate entity where the individual

911 NE 11TH AVENUE
SUITE 630
PORTLAND, OR 97232
(503) 326-7525

405 EAST 8TH AVE
SUITE 2020
EUGENE, OR 97401
(541) 431-0229

SAC ANNEX BUILDING
105 FIR ST
SUITE 201
LA GRANDE, OR 97850
(541) 962-7691

U.S. COURTHOUSE
310 WEST 6TH ST
ROOM 118
MEDFORD, OR 97501
(541) 858-5122

THE JAMISON BUILDING
131 NW HAWTHORNE AVE
SUITE 107
BEND, OR 97701
(541) 330-9142

707 13TH ST, SE
SUITE 285
SALEM, OR 97301
(503) 589-4555

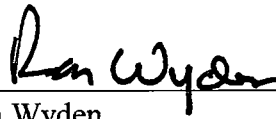
[HTTP://WYDEN.SENATE.GOV](http://wyden.senate.gov)

PRINTED ON RECYCLED PAPER

participated directly in the deceptive practices or acts or had authority to control them. See e.g. *POM Wonderful v. FTC*, No. 13-1060 (D.C. Cir. 2015). Given Mr. Zuckerberg's deceptive statements, his personal control over Facebook, and his role in approving key decisions related to the sharing of user data, the FTC can and must hold Mr. Zuckerberg personally responsible for these continued violations. The FTC must also make clear the significant and material penalties that will apply to both Facebook the corporation and Mr. Zuckerberg the individual should any future violations occur.

Thank you for your attention to this pressing matter. I look forward to your prompt response.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Wyden", is written over a horizontal line.

Ron Wyden
United States Senator

EXHIBIT 12



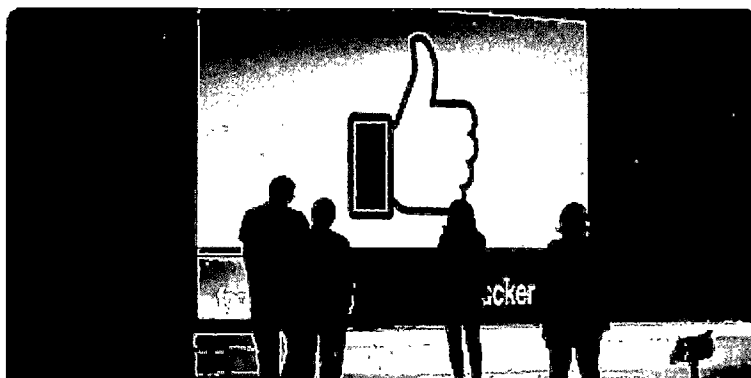
Richard Blumenthal

@SenBlumenthal

Follow



Mounting evidence Facebook acted chaotically, recklessly, & lawlessly by granting access to private consumer data for financial gain. These new documents show clearly that Facebook failed to heed their consent decree agreement & basic standards of privacy.



Facebook Used People's Data to Favor Certain Partners and Punish ...

A trove of internal Facebook documents was released by a British parliamentary committee as part of an investigation into misinformation an...
[nytimes.com](https://www.nytimes.com)

3:06 PM - 5 Dec 2018

1,106 Retweets 1,704 Likes



97

1.1K

1.7K

EXHIBIT 13

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel
Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23

**INDIVIDUAL DEFENDANTS' SPECIAL
INTERROGATORIES TO PLAINTIFF
SIX4THREE, LLC PURSUANT TO
CALIFORNIA CODE OF CIVIL
PROCEDURE ("CCP") SECTION 708.020 ET
SEQ. (SET ONE)**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

PROPOUNDING PARTY: DEFENDANTS MARK ZUCKERBERG, CHRISTOPHER COX, JAVIER OLIVAN, SAMUEL LESSIN, MICHAEL VERNAL, AND ILYA SUKHAR

RESPONDING PARTY: PLAINTIFF SIX4THREE, LLC

SET: ONE

Pursuant to California Code of Civil Procedure ("CCP") section 708.020 *et seq.*, Defendants Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar (collectively "Individual Defendants") request that Plaintiff Six4Three, LLC ("Six4Three") answer separately and completely, in writing, under oath, within 30 days of service hereof, each of the specially prepared interrogatories ("Interrogatories") set forth below in accordance with the following Definitions and Instructions.

DEFINITIONS

As used herein, the following terms shall have the following meanings:

A. "ALL" includes any and all; the singular form of a noun or pronoun includes the plural form of the noun or pronoun, and vice versa; the neuter form of a pronoun includes the masculine and feminine forms of the pronoun, and vice versa; and the use of any tense of any verb includes all other tenses of the verb. In each such instance, the Interrogatory shall be construed so as to furnish the most complete and inclusive answer.

B. "DESCRIBE IN DETAIL" means to describe fully by reference to underlying facts rather than by ultimate facts or conclusions of facts or law and to particularize as to time, place, and manner, to IDENTIFY ALL natural persons or entities with knowledge of those facts, and to IDENTIFY ALL DOCUMENTS concerning such facts.

C. "DOCUMENT" and "DOCUMENTS" mean and refer to any written, printed, typed, recorded, magnetic, digitized, punched, copied, graphic or other tangible thing in, through, or from which information may be embodied, translated, conveyed, or stored INCLUDING letters, correspondence, memoranda, notes, records, minutes, studies, reports, ledgers, books, notebooks, pamphlets, announcements, publications, advertisements, sales literature, brochures, manuals, price lists, messages, papers, legal instruments, agreements, telegrams, telexes, electronic mail, electronic attachments,

1 dictation tapes, audio tapes, video tapes, film, computer files, computer tapes (INCLUDING backup
2 tapes), computer discs (INCLUDING back up discs), computer printouts, microfilm, microfiche,
3 worksheets, diaries, calendars, photographs, prints, pictures, charts, drawings, sketches, graphs, and all
4 other "writings" as defined in CCP section 250, as well as data stored in a computer, data stored on
5 removable magnetic or optical media (e.g., magnetic tape, floppy discs and recordable optical disks), data
6 used for electronic data interchange, audit trails, digitized pictures and video (e.g., data stored in MPEG,
7 JPEG and GIF formats), and digitized audio and voicemail. A draft or non-identical copy is a separate
8 DOCUMENT within the meaning of this term.

9 D. "FACEBOOK" shall refer to Defendant Facebook, Inc.

10 E. "SIX4THREE," "643," "YOU," and "YOUR" refers to Plaintiff Six4Three, LLC.

11 F. The "643 APP" refers to the Pikinis application created by Six4Three.

12 G. "IDENTIFY," when used with respect to a document, shall be read to require YOU to
13 identify the document by production number in this litigation, or, if the document has not been produced
14 in this litigation, to state the type or nature of the document or filing description, the date of its
15 preparation, the identity of the person(s) who prepared the document, the identity of person(s) who
16 signed the document, the sender, the recipient(s) and addressee(s), a description of the subject matter and
17 content, the name and address of any person having possession, custody, or control of the same or a true
18 copy thereof, and all other means of identifying the document with sufficient particularity so as to satisfy
19 the requirements for its inclusion in a demand or interrogatory for its production pursuant to California
20 Code of Civil Procedure Section 2030.220 including section and page number.

21 H. "IDENTIFY," when used with respect to an event or fact, shall be read to require YOU to
22 state the date of the instance and the identity of the parties involved, to describe the circumstances
23 surrounding and subject matter communicated as part of the instance, and to IDENTIFY all relevant
24 DOCUMENTS.

25 I. "IDENTIFY," when used in reference to a natural person, shall be read to require YOU to
26 provide the full name, the present or last known business and residence addresses, the present or last
27 known business affiliation or position, and the position during the time specified of said individual.

28 J. "INCLUDING" means including, but not limited to, the referenced item or items.

1 K. "PERSON" and "PERSONS" mean any natural person and any other cognizable business,
2 legal, or governmental entity or association, INCLUDING corporations, proprietorships, partnerships,
3 joint ventures, consortiums, clubs, associations, foundations, governmental agencies or instrumentalities,
4 societies and orders.

5 L. "RELATING TO" and "RELATE TO" shall be construed in its broadest sense to require
6 information or documents that constitute, contain, reflect, identify, describe, discuss, summarize,
7 evidence, reference, explain, comment on or concern in any way the subject matter of the request.

8 M. "STATE THE COMPLETE FACTUAL BASIS" means to set forth a complete and
9 detailed statement of all information, circumstances and facts that RELATE TO, comprise or bear upon
10 the subject matter of the Interrogatory, INCLUDING identifying (i) all PERSONS knowledgeable and/or
11 involved in the subject matter of the Interrogatory; (ii) all relevant DOCUMENTS; and (iii) all relevant
12 dates.

13 N. A request to IDENTIFY EVERY PERSON means to provide each PERSON'S name, title
14 and last known business or residential address and telephone number.

15 **INSTRUCTIONS**

16 1. Unless otherwise specified, the applicable time period for these discovery requests shall
17 be January 1, 2012, through the date of the final responses to these discovery requests.

18 2. These Interrogatories seek information to the fullest extent provided for in the CCP and
19 shall be interpreted so as to make each Interrogatory inclusive rather than exclusive.

20 3. YOU are requested to answer each Interrogatory set forth below separately and
21 completely in writing under oath. YOUR response hereto is to be signed and verified by the person
22 making it, and the objections signed by the attorney making them, as required by CCP sections 2030.210
23 and 2030.250.

24 4. Each Interrogatory shall be answered fully unless it is objected to in good faith, in which
25 event the reasons for YOUR objection shall be stated in detail. If an objection pertains to only a portion
26 of an Interrogatory, or a word, phrase or clause contained within it, YOU are required to state YOUR
27 objection to that portion only and to respond to the remainder of the Interrogatory, using YOUR best
28 efforts to do so.

1 amount, value, and location); (viii) judgments held by YOU against third parties (specifying as to each
2 the court, case number, case name, and amount); and (ix) intellectual property (specifying as to each the
3 type, interest, and value).

4 **SPECIAL INTERROGATORY NO. 6:**

5 IDENTIFY all property of SIX4THREE held by third parties—specifying as to each property: (i)
6 the person holding said property; (ii) the location of said property; (iii) a description of said property; and
7 (iv) the value of said property.

8 **SPECIAL INTERROGATORY NO. 7:**

9 DESCRIBE IN DETAIL all safes or safe-deposit boxes used by YOU, including but not limited
10 to the banking institution where it is located, in whose name it is listed, how it is numbered or identified,
11 and its contents.

12 **SPECIAL INTERROGATORY NO. 8:**

13 IDENTIFY each PERSON or entity for whom you performed services since January 1, 2012 and
14 state the amount you were paid for your services or the amount you are owed for your services.

15 **SPECIAL INTERROGATORY NO. 9:**

16 IDENTIFY the name, address, and telephone number of ALL PERSONS or entities that are
17 indebted to YOU, and provide the amount of each account or note receivable.

18 **SPECIAL INTERROGATORY NO. 10:**

19 DESCRIBE IN DETAIL any vested future interest YOU have in any property or in the payment
20 of any money, specifying as to each interest, (i) the location of the property or money; (ii) the identity
21 and address of all PERSONS that may be involved; (iii) the circumstances that will cause the property or
22 money to inure to YOUR benefit; and (iv) the probable value of such property or money.

23 **SPECIAL INTERROGATORY NO. 11:**

24 DESCRIBE IN DETAIL any money or property held in trust for YOU, including but not limited
25 to, (i) the name of the trustee or fiduciary; (ii) the name of/on the trust; (iii) the money or property held in
26 trust; (iv) the value thereof; (v) the date, if any, upon which the trust is to terminate; (vi) the amount of
27 income which is or may be received therefrom; (vii) the timing or schedule of any such payments; (viii)

the value of the corpus of the trust which may be distributed to YOU; and (ix) the expected date of distribution.

SPECIAL INTERROGATORY NO. 12:

DESCRIBE IN DETAIL any transfer of over \$500 made to or from YOU from January 1, 2012 to present—specifying as to each transfer: (i) the name of the transferee; (ii) the name of the transferor; (iii) the amount transferred; (iv) the date of the transfer; and (v) the reason for the transfer.

SPECIAL INTERROGATORY NO. 13:

Provide the following information relating to ALL insurance policies now in force and owned directly or indirectly by YOU:

Number of Policy	Name of Company	Amount of Policy	Present Cash Surrender Value Accumulated Dividends

SPECIAL INTERROGATORY NO. 14:

IDENTIFY all sources of income for the following years:

Source	2012	2013	2014	2015	2016	2017	2018
Dividends							
Interest							
Income from Business							
Partnership Income							

Source	2012	2013	2014	2015	2016	2017	2018
Capital Gains							
Rents and Royalties							
Disposition of Precious Metals							

SPECIAL INTERROGATORY NO. 15:

With respect to each of the items set forth in the preceding interrogatory, state the name, address, and telephone number of the source from which the income was received (and provide account numbers where applicable).

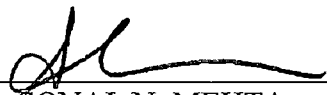
SPECIAL INTERROGATORY NO. 16:

Have you any other assets or an interest in assets, either actual or contingent, other than those listed in the previous interrogatory requests (i.e., antiques, stamp collections, boat, musical instruments, etc.)? If so, please describe the assets in detail, IDENTIFY the location of the asset, and state the current fair market value of each such asset.

Dated: May 3, 2019

DURIE TANGRI LLP

By: _____


SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM
ZACHARY G. F. ABRAHAMSON

Attorneys for Defendants
Mark Zuckerberg, Christopher Cox, Javier Olivan,
Samuel Lessin, Michael Vernal, and Ilva Sukhar

1 **PROOF OF SERVICE**

2 I am employed in San Francisco County, State of California, in the office of a member of the bar
3 of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a
4 party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

5 On May 3, 2019, I served the following documents in the manner described below:

6 **INDIVIDUAL DEFENDANTS' SPECIAL INTERROGATORIES TO PLAINTIFF**
7 **SIX4THREE, LLC (SET ONE)**

- 8 ☒ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier
and/or process server for hand delivery on this date.
- 9 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
10 Durie Tangri's electronic mail system from ckim@durietangri.com to the email addresses
set forth below.

11 On the following part(ies) in this action:

12 **VIA MESSENGER SERVICE**
13 **AND EMAIL**

14 Theodore Kramer
1267 Chestnut St., Apt. 6
San Francisco, CA 94109
ted@six4three.com

15 *Agent for Service of Process for*
16 *Six4Three, LLC*

12 **VIA EMAIL ONLY**

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

17 *Attorney for Theodore Kramer and Thomas*
18 *Scaramellino (individual capacities)*

19
20 I declare under penalty of perjury under the laws of the United States of America that the
21 foregoing is true and correct. Executed on May 3, 2019, at San Francisco, California.

22
23 
24 Catherine Kim

DURIE TANGRI LLP
SONAL N. MEHTA (SBN 222086)
smehta@durietangri.com
JOSHUA H. LERNER (SBN 220755)
jlerner@durietangri.com
LAURA E. MILLER (SBN 271713)
lmiller@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
ZACHARY G. F. ABRAHAMSON (SBN 310951)
zabrahamson@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel
Lessin, Michael Vernal, and Ilya Sukhar

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;
MARK ZUCKERBERG, an individual;
CHRISTOPHER COX, an individual;
JAVIER OLIVAN, an individual;
SAMUEL LESSIN, an individual;
MICHAEL VERNAL, an individual;
ILYA SUKHAR, an individual; and
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond
Swope, Dept. 23**

**INDIVIDUAL DEFENDANTS' REQUESTS
FOR PRODUCTION TO PLAINTIFF
SIX4THREE, LLC (SET ONE)**

Dept: 23 (Complex Civil Litigation)
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015
TRIAL DATE: April 25, 2019

PROPOUNDING PARTY: DEFENDANTS MARK ZUCKERBERG, CHRISTOPHER COX, JAVIER OLIVAN, SAMUEL LESSIN, MICHAEL VERNAL, AND ILYA SUKHAR

RESPONDING PARTY: PLAINTIFF SIX4THREE, LLC

SET: ONE

Pursuant to California Code of Civil Procedure (“CCP”) section 708.030 *et seq.*, Defendants Mark Zuckerberg, Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar (collectively “Individual Defendants”) request and demand that Plaintiff Six4Three, LLC (“Plaintiff”) produce for inspection and copying the following documents or categories of documents in its possession, custody, or control. Pursuant to California Code of Civil Procedure section 708.030, Plaintiff is required to serve a response to this production demand within 30 days after the date of service of this demand. The document requests set forth below (“Document Requests”) are to be responded to in accordance with the following Definitions and Instructions.

DEFINITIONS

As used herein, the following terms shall have the following meanings:

A. “ANY” includes any and all, and “ALL” includes any and all; the singular form of a noun or pronoun includes the plural form of the noun or pronoun, and vice versa; the neuter form of a pronoun includes the masculine and feminine forms of the pronoun, and vice versa; and the use of any tense of any verb includes all other tenses of the verb. In each such instance, the Document Request shall be construed so as to furnish the most complete and inclusive answer.

B. “CONSTITUTING,” “REFLECTING,” “REGARDING,” “RELATING TO” and “RELATE TO” shall be construed in their broadest sense to require information or documents that constitute, contain, reflect, identify, describe, discuss, demonstrate, summarize, evidence, show, reference, explain, comment on or concern in any way the subject matter of the request.

C. “DOCUMENT” and “DOCUMENTS” means any written, printed, typed, recorded, magnetic, digitized, punched, copied, graphic or other tangible thing in, through, or from which information may be embodied, translated, conveyed, or stored including letters, correspondence, memoranda, notes, records, minutes, studies, reports, ledgers, books, notebooks, pamphlets,

1 announcements, publications, advertisements, sales literature, brochures, manuals, price lists, messages,
2 papers, legal instruments, agreements, telegrams, telexes, electronic mail, electronic attachments,
3 dictation tapes, audio tapes, video tapes, film, computer files, computer tapes (including backup tapes),
4 computer discs (including backup discs), computer printouts, microfilm, microfiche, worksheets, diaries,
5 calendars, photographs, prints, pictures, charts, drawings, sketches, graphs, and all of the writings or
6 drafts thereof as defined in California Evidence Code section 250, as well as data stored in a computer,
7 computer networks, hard-drives, USB drives, CDs, DVDs, data stored on removable magnetic or optical
8 media (e.g., magnetic tape, floppy discs and recordable optical disks), data used for electronic data
9 interchange, audit trails, digitized pictures and video (e.g., data stored in MPEG, JPEG and GIF formats),
10 and digitized audio and voicemail. A draft or non-identical copy is a separate document within the
11 meaning of this term.

12 D. "COMMUNICATIONS" means the transmittal of information (in the form of facts, ideas,
13 inquiries, or otherwise).

14 E. "FACEBOOK" shall refer to Defendant Facebook, Inc.

15 F. "643" and "SIX4THREE" refers to Plaintiff Six4Three LLC.

16 G. "INCLUDING" means including, but not limited to, the referenced item or items.

17 H. "PERSON" and "PERSONS" mean any natural person and any other cognizable business,
18 legal, or governmental entity or association, INCLUDING corporations, proprietorships, partnerships,
19 joint ventures, consortiums, clubs, associations, foundations, governmental agencies or instrumentalities,
20 societies and orders.

21 I. "YOU" and "YOUR" refers to Plaintiff Six4Three LLC.

22 J. As used herein, the words "and" and "or" shall be either conjunctive or disjunctive as
23 necessary to bring within the scope of the discovery request all responses that might otherwise be
24 construed to be outside of its scope.

25 **INSTRUCTIONS**

26 1. These Document Requests seek the production of DOCUMENTS to the fullest extent
27 provided for in the California Rules of Civil Procedure and shall be interpreted so as to make each
28 Document Request inclusive rather than exclusive.

1 2. The original and each non-identical copy of each DOCUMENT or other tangible thing
2 requested herein which is in YOUR possession, custody or control is to be produced. If the original is
3 not in YOUR possession, custody or control, a full, clear, legible copy thereof is to be produced.

4 3. Each Document Request shall be answered fully unless it is in good faith objected to, in
5 which event the reasons for YOUR objection shall be stated in detail. If an objection pertains to only a
6 portion of a Request, or a word, phrase, or clause contained within it, YOU are required to state YOUR
7 objection to that portion only and to respond to the remainder of the Request, using YOUR best efforts to
8 do so.

9 4. Pursuant to California Code of Civil Procedure section 708.030, each DOCUMENT or
10 thing produced in response to these Document Requests is to be produced as it is kept in the usual course
11 of business, INCLUDING all metadata, file folders, binders, notebooks and other devices or storage
12 media on which such DOCUMENT may be organized, separated or stored.

13 5. A representation of inability to comply with a particular Document Request or any portion
14 thereof shall affirm that a diligent search and a reasonable inquiry have been made. Such affirmation
15 shall also specify whether the inability to comply is because the item has never existed, has been
16 destroyed, has been lost, misplaced or stolen, or has never been, or no longer is, in YOUR possession,
17 custody, or control. If the item is not in YOUR possession, custody or control, the statement shall
18 specify the name and address of any PERSON believed to have such possession, custody or control.

19 6. In responding to these Document Requests, YOU are specifically directed to review the
20 personnel files, records, notes, correspondence, daily calendars, telephone logs, electronic and digital
21 files and data and email of all PERSONS with knowledge of the information inquired about in each
22 Request.

23 7. If YOU object or refuse to produce any DOCUMENT responsive to any Document
24 Request on grounds other than the work-product doctrine, please describe the ground(s) separately, fully
25 and with particularity.

26 8. If YOU or YOUR counsel assert that any DOCUMENT or thing required to be produced
27 is protected from discovery on the basis of the work-product doctrine or otherwise, please set forth in
28

1 YOUR written response hereto with respect to each DOCUMENT for which a claim of work product
2 protection is made:

3 a. The approximate date, and manner of recording, creating or otherwise preparing
4 the DOCUMENT;

5 b. The name and organizational position, if any, of each sender of the DOCUMENT;

6 c. The name and organizational position, if any, of each recipient or custodian of the
7 DOCUMENT;

8 d. The name and organizational position, if any, of each PERSON (other than
9 stenographic or clerical assistants) participating in the preparation or creation of the DOCUMENT;

10 e. The name and organizational position, if any, of each PERSON to whom the
11 contents of the DOCUMENT or any portion thereof have heretofore been communicated by copy,
12 exhibition, reading, summarization or otherwise; and

13 f. A statement of the basis on which work product protection is claimed with respect
14 to each DOCUMENT and whether or not its contents are limited solely to attorney work product.

15 **REQUESTS FOR PRODUCTION**

16 **REQUEST FOR PRODUCTION NO. 1:**

17 ALL DOCUMENTS relating to the official corporate records of SIX4THREE—including, but
18 not limited to: (i) bylaws; (ii) articles of incorporation; (iii) meeting minutes; (iv) agendas; (v)
19 summaries; (vi) organizational charts; and (vii) lists of shareholders—and DOCUMENTS sufficient to
20 IDENTIFY each PERSON having an interest (whether equity, security, debt, or other legal interest) in
21 SIX4THREE (including partners, shareholders, and/or agents) and the value of such interest.

22 **REQUEST FOR PRODUCTION NO. 2:**

23 ALL DOCUMENTS and COMMUNICATIONS relating to any real estate in which YOU have
24 an ownership interest, and any income YOU derive therefrom, whether directly or indirectly.

25 **REQUEST FOR PRODUCTION NO. 3:**

26 ALL DOCUMENTS and COMMUNICATIONS relating to any business entity in which YOU
27 have an ownership interest.
28

1 **REQUEST FOR PRODUCTION NO. 4:**

2 ALL DOCUMENTS and COMMUNICATIONS relating to financial statements executed,
3 drafted, or issued by YOU since January 1, 2012.

4 **REQUEST FOR PRODUCTION NO. 5:**

5 ALL DOCUMENTS and COMMUNICATIONS relating to ALL property that YOU own in
6 whole or in part, whether in YOUR name or that of another and wherever located—including, but not
7 limited to: (i) all checking and savings accounts, as well as ALL bank names, account numbers and
8 balances; (ii) jewelry; (iii) motor vehicles or watercraft (make, model, year, license number, serial/VIN
9 number, state of registration, and fair market value); (iv) debts or notes owed by another to YOU; (v)
10 stocks, bonds, or other securities; (vi) office equipment, including without limitation furniture, mobile or
11 landline phones, computers and computer accessories, and all other electronic devices; (vii) inventory
12 (specifying as to each a description, the amount, value, and location); (viii) judgments held by YOU
13 against third parties (specifying as to each the court, case number, case name, and amount); and (ix)
14 intellectual property (specifying as to each the type, interest, and value).

15 **REQUEST FOR PRODUCTION NO. 6:**

16 ALL DOCUMENTS and COMMUNICATIONS relating to ALL property of SIX4THREE held
17 by third parties.

18 **REQUEST FOR PRODUCTION NO. 7:**

19 ALL DOCUMENTS and COMMUNICATIONS relating to ALL safes or safe-deposit boxes used
20 by YOU.

21 **REQUEST FOR PRODUCTION NO. 8:**

22 ALL DOCUMENTS and COMMUNICATIONS relating to any vested future interest YOU have
23 in any property or in the payment of any money.

24 **REQUEST FOR PRODUCTION NO. 9:**

25 ALL DOCUMENTS and COMMUNICATIONS relating to any money or property held in trust
26 for YOU.

27 **REQUEST FOR PRODUCTION NO. 10:**

28 ALL federal and state corporate tax returns SIX4THREE has filed for tax years 2009 to present.

1 **REQUEST FOR PRODUCTION NO. 11:**

2 ALL DOCUMENTS and COMMUNICATIONS relating to any loans and/or mortgages owed to
3 SIX4THREE.

4 **REQUEST FOR PRODUCTION NO. 12:**

5 ALL DOCUMENTS and COMMUNICATIONS relating to any transfer over \$500 made to or
6 from SIX4THREE from January 1, 2012 to present.

7 **REQUEST FOR PRODUCTION NO. 11:**

8 DOCUMENTS sufficient to show each PERSON or entity for whom YOU performed services
9 since January 1, 2012 and the amount YOU were paid for your services or the amount YOU are owed for
10 YOUR services.

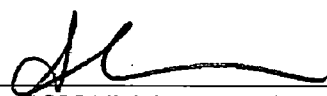
11 **REQUEST FOR PRODUCTION NO. 12:**

12 ALL DOCUMENT and COMMUNICATIONS relating to ALL insurance policies now in force
13 and owned directly or indirectly by YOU.

14
15 Dated: May 3, 2019

DURIE TANGRI LLP

16
17 Bv: _____


SONAL N. MEHTA
JOSHUA H. LERNER
LAURA E. MILLER
CATHERINE Y. KIM
ZACHARY G. F. ABRAHAMSON

18
19
20 Attorneys for Defendants
21 Mark Zuckerberg, Christopher Cox, Javier Olivan,
22 Samuel Lessin, Michael Vernal, and Ilva Sukhar
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 I am employed in San Francisco County, State of California, in the office of a member of the bar
3 of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a
4 party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

5 On May 3, 2019, I served the following documents in the manner described below:

6 **INDIVIDUAL DEFENDANTS' REQUESTS FOR PRODUCTION TO PLAINTIFF**
7 **SIX4THREE, LLC (SET ONE)**

- 8 ☒ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier
and/or process server for hand delivery on this date.
- 9 ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through
10 Durie Tangri's electronic mail system from ckim@durietangri.com to the email addresses
set forth below.

11 On the following part(ies) in this action:

12 **VIA MESSENGER SERVICE**
13 **AND EMAIL**

14 Theodore Kramer
1267 Chestnut St., Apt. 6
San Francisco, CA 94109
ted@six4three.com

15 *Agent for Service of Process for*
16 *Six4Three, LLC*

12 **VIA EMAIL ONLY**

Jack Russo
Christopher Sargent
ComputerLaw Group, LLP
401 Florence Street
Palo Alto, CA 94301
jrusso@computerlaw.com
csargent@computerlaw.com
ecf@computerlaw.com

17 *Attorney for Theodore Kramer and Thomas*
18 *Scaramellino (individual capacities)*

19
20
21 I declare under penalty of perjury under the laws of the United States of America that the
22 foregoing is true and correct. Executed on May 3, 2019, at San Francisco, California.

23 
24 Catherine Kim

EXHIBIT 14



LOG IN

1,748,326

Views



Add



Recommend



Like



Share

Carole Cadwalladr at TED2019

Facebook's role in Brexit — and the threat to democracy

[Up next](#) [Details](#) [Transcript](#) [Reading List](#) [Comments \(655\)](#)

English



00:01

So, on the day after the Brexit vote, in June 2016, when Britain woke up to the shock of discovering that we're leaving the European Union, my editor at the "Observer" newspaper in the UK asked me to go back to South Wales, where I grew up, and to write a report. And so I went to a town called Ebbw Vale.

00:23

Here it is. It's in the South Wales Valleys, which is this quite special place. So it's had this very,

sort of rich, working-class culture, and it's famous for its Welsh male voice choirs and rugby and its coal. But when I was a teenager, the coal mines and the steelworks closed, and the entire area was devastated. And I went there because it had one of the highest "Leave" votes in the country. Sixty-two percent of the people here voted to leave the European Union. And I wanted to know why.

00:57

When I got there, I was just a bit taken aback, because the last time I went to Ebbw Vale, it looked like this. And now, it looks like this. This is a new 33-million-pound college of further education that was mostly funded by the European Union. And this is the new sports center that's at the middle of 350-million-pound regeneration project that's being funded by the European Union. And this is the new 77-million-pound road-improvement scheme, and there's a new train line, a new railway station, and they're all being funded by the European Union. And it's not as if any of this is a secret, because there's big signs like this everywhere.

01:41

[EU Funds: Investing in Wales]

01:43

(Laughter)

01:45

I had this sort of weird sense of unreality, walking around the town. And it came to a head when I met this young man in front of the sports center. And he told me that he had voted to leave, because the European Union had done nothing for him. He was fed up with it. And all around town, people told me the same thing. They said that they wanted to take back control, which was one of the slogans in the campaign. And they told me that they were most fed up with the immigrants and with the refugees. They'd had enough.

02:24

Which was odd. Because walking around, I didn't meet any immigrants or refugees. I met one Polish woman who told me she was practically the only foreigner in town. And when I checked the figures, I discovered that Ebbw Vale actually has one of the lowest rates of immigration in

the country. And so I was just a bit baffled, because I couldn't really understand where people were getting their information from. Because it was the right-wing tabloid newspapers which printed all these stories about immigration. And this is a very much left-wing Labour stronghold.

02:56

But then after the article came out, this woman got in touch with me. And she was from Ebbw Vale, and she told me about all this stuff that she'd seen on Facebook. I was like, "What stuff?" And she said it was all this quite scary stuff about immigration, and especially about Turkey. So I tried to find it. But there was nothing there. Because there's no archive of ads that people had seen or what had been pushed into their news feeds. No trace of anything, gone completely dark. And this referendum that will have this profound effect forever on Britain -- it's already had a profound effect: the Japanese car manufacturers that came to Wales and the north east to replace the mining jobs -- they are already going because of Brexit.

03:42

And this entire referendum took place in darkness, because it took place on Facebook. And what happens on Facebook stays on Facebook, because only you see your news feed, and then it vanishes, so it's impossible to research anything. So we have no idea who saw what ads or what impact they had, or what data was used to target these people. Or even who placed the ads, or how much money was spent, or even what nationality they were.

04:16

But Facebook does. Facebook has these answers, and it's refused to give them to us. Our parliament has asked Mark Zuckerberg multiple times to come to Britain and to give us these answers. And every single time, he's refused. And you have to wonder why. Because what I and other journalists have uncovered is that multiple crimes took place during the referendum. And they took place on Facebook.

04:48

It's because in Britain, we limit the amount of money that you can spend in an election. And it's because in the 19th century, people would walk around with literally wheelbarrows of cash and just buy voters. So we passed these strict laws to stop that from happening. But those laws don't work anymore. This referendum took place almost entirely online. And you can spend any

amount of money on Facebook or on Google or on YouTube ads and nobody will know, because they're black boxes. And this is what happened.

05:22

We've actually got no idea of the full extent of it. But we do know that in the last days before the Brexit vote, the official "Vote Leave" campaign laundered nearly three quarters of a million pounds through another campaign entity that our electoral commission has ruled was illegal, and it's referred it to the police.

05:43

And with this illegal cash, "Vote Leave" unleashed a fire hose of disinformation. Ads like this.

05:54

[Turkey's 76m people joining the EU]

05:56

This is a lie, it's a total lie. Turkey is not joining the European Union. There's not even any discussions of it joining the European Union. And most of us, we never saw these ads, because we were not the target of them. "Vote Leave" identified a tiny sliver of people who it identified as persuadable, and they saw them. And the only reason we are seeing these now is because parliament forced Facebook to hand them over.

06:25

And maybe you think, "Well, it was just a bit of overspending. It's a few lies." But this was the biggest electoral fraud in Britain for 100 years. In a once-in-a-generation vote that hinged upon just one percent of the electorate. And it was just one of the crimes that took place in the referendum.

06:51

There was another group, which was headed by this man, Nigel Farage, the one to the right of Trump. And his group, "Leave.EU" -- it also broke the law. It broke British electoral laws and

British data laws, and it's also being referred to the police. And this man, Arron Banks, he funded this campaign. And in a completely separate case, he's being referred to our National Crime Agency, our equivalent of the FBI, because our electoral commission has concluded they don't know where his money came from. Or if it was even British. And I'm not even going to go into the lies that Arron Banks has told about his covert relationship with the Russian government. Or the weird timing of Nigel Farage's meetings with Julian Assange and with Trump's buddy, Roger Stone, now indicted, immediately before two massive WikiLeaks dumps, both of which happened to benefit Donald Trump. But I will tell you that Brexit and Trump were intimately entwined. This man told me that Brexit was the petri dish for Trump. And we know it's the same people, the same companies, the same data, the same techniques, the same use of hate and fear.

08:12

This is what they were posting on Facebook. And I don't even want to call this a lie,

08:18

[Immigration without assimilation equals invasion]

08:20

because it feels more like a hate crime to me.

08:26

I don't have to tell you that hate and fear are being sown online all across the world. Not just in Britain and America, but in France and in Hungary and Brazil and Myanmar and New Zealand. And we know there is this dark undertow which is connecting us all globally. And it is flowing via the technology platforms. But we only see a tiny amount of what's going on on the surface.

08:55

And I only found out anything about this dark underbelly because I started looking into Trump's relationship to Farage, into a company called Cambridge Analytica. And I spent months tracking down an ex-employee, Christopher Wiley. And he told me how this company, that worked for both Trump and Brexit had profiled people politically in order to understand their

worked for both Trump and Brexit, had profiled people personally in order to understand their individual fears, to better target them with Facebook ads. And it did this by illicitly harvesting the profiles of 87 million people from Facebook. It took an entire year's work to get Christopher on the record. And I had to turn myself from a feature writer into an investigative reporter to do it. And he was extraordinarily brave, because the company is owned by Robert Mercer, the billionaire who bankrolled Trump, and he threatened to sue us multiple times, to stop us from publishing.

10:01

But we finally got there, and we were one day ahead of publication. We got another legal threat. Not from Cambridge Analytica this time, but from Facebook. It told us that if we publish, they would sue us. We did it anyway.

10:18

(Applause)

10:28

Facebook, you were on the wrong side of history in that. And you were on the wrong side of history in this -- in refusing to give us the answers that we need. And that is why I am here. To address you directly, the gods of Silicon Valley.

10:47

(Applause)

10:51

Mark Zuckerberg ...

10:53

(Applause)

10:54

and Sheryl Sandberg and Larry Page and Sergey Brin and Jack Dorsey, and your employees and your investors, too. Because 100 years ago, the biggest danger in the South Wales coal mines was gas. Silent and deadly and invisible. It's why they sent the canaries down first to check the air. And in this massive, global, online experiment that we are all living through, we in Britain are the canary. We are what happens to a western democracy when a hundred years of electoral laws are disrupted by technology.

11:33

Our democracy is broken, our laws don't work anymore, and it's not me saying this, it's our parliament published a report saying this. This technology that you have invented has been amazing. But now, it's a crime scene. And you have the evidence. And it is not enough to say that you will do better in the future. Because to have any hope of stopping this from happening again, we have to know the truth.

12:09

And maybe you think, "Well, it was just a few ads. And people are smarter than that, right?" To which I would say, "Good luck with that." Because what the Brexit vote demonstrates is that liberal democracy is broken. And you broke it. This is not democracy -- spreading lies in darkness, paid for with illegal cash, from God knows where. It's subversion, and you are accessories to it.

12:48

(Applause)

12:57

Our parliament has been the first in the world to try to hold you to account, and it's failed. You are literally beyond the reach of British law -- not just British laws, this is nine parliaments, nine countries are represented here, who Mark Zuckerberg refused to come and give evidence to.

13:18

And what you don't seem to understand is that this is bigger than you. And it's bigger than any of us. And it is not about left or right or "I leave" or "Remain" or Trump or not. It's about whether

of us. And it is not about left or right or Leave or Remain or Trump or not. It's about whether it's actually possible to have a free and fair election ever again. Because as it stands, I don't think it is.

13:40

And so my question to you is, is this what you want? Is this how you want history to remember you: as the handmaidens to authoritarianism that is on the rise all across the world? Because you set out to connect people. And you are refusing to acknowledge that the same technology is now driving us apart.

14:09

And my question to everybody else is, is this what we want: to let them get away with it, and to sit back and play with our phones, as this darkness falls?

14:22

The history of the South Wales Valleys is of a fight for rights. And this is not a drill -- it's a point of inflection. Democracy is not guaranteed, and it is not inevitable, and we have to fight and we have to win and we cannot let these tech companies have this unchecked power. It's up to us -- you, me and all of us. We are the ones who have to take back control.

14:52

(Applause)

14:55

(Cheers)

14:58

(Applause)